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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 760

STATE OF IOWA,
CONSERVATION COMMISSION OF IOWA,
HIGHWAY COMMISSION OF IOWA,
GEORGE CORRIELL, et al.,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT, AND SUPPORTING BRIEF.

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April 1950.

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FEDERAL POWER COMMISSION,
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FIRST IOWA HYDRO-ELECTRIC COOPERATIVE,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT, AND SUPPORTING BRIEF.

The State of Iowa, the Conservation Commission of Iowa, the Highway Commission of Iowa, George Corriell, and other owners and occupants of lands and homesteads directly affected, respectfully petition for a review on Writ of Certiorari of a decision of the United States Court of Appeals, Eighth Circuit, the opinion in which was filed on December 28, 1949, and a Petition for Rehearing of which was denied on January 20, 1950, by said court. Said decision affirmed an Order of the Federal Power Commission granting and giving a license to the First Iowa Hydro-

Electric Cooperative, Intervenor herein, affirmatively authorizing the construction and operation of a hydro-electric project within the State of Iowa, using the diverted waters from the Cedar River, an interior river of Iowa, for the source of power, over the objections of your petitioners.

OPINION OF COURT.

The opinion of the United States Court of Appeals, Eighth Circuit (R. p. 11) is reported in 178 F. 2d 421. The Orders of the Federal Power Commission involved are set out at United States Court of Appeals Record, pages 91 and 106 respectively, (R. p. 5 (91, 106)) there being two Orders.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 313(b) of the Federal Power Act (16 USCA Sec. 825-l); the Act of June 25, 1948, c. 646; 62 Stat. 928, Judicial Code (28 USCA Sec. 1254).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

United States Constitution, Article I, Section 8, Clause 3;
Amendment 10, United States Constitution;
Federal Power Act, 49 Stat. 838, 16 USCA Sec. 791(a) et seq;
Chapter 469, Code of Iowa, 1946 (On the Record known as Chapter 363, Code of Iowa 1939);
Chapter 246 Laws of 52nd General Assembly of Iowa.

STATEMENT.

The First Iowa Hydro-Electric Cooperative, the Intervenor herein, is a corporation for profit, organized under the provisions of Chapter 390.1, Code of Iowa, 1939 (Exhibit No. 67) now Chapter 499, Code of Iowa, 1946. The Intervenor

filed an application with the Federal Power Commission (R. p. 1) for a license under the provisions of the Federal Power Act. The proposed project includes the construction of a diversion dam across the Cedar River at a point above the Salisbury bridge and below the town of Moscow, consisting of an embankment of about 8000 feet long, and a flanging dike on the west side and upstream from the dam approximately 15,000 feet long, the purpose being to create a reservoir of approximately 11,000 land acres. Substantially all of the water in the Cedar River will be diverted from the reservoir through a canal to be constructed easterly across land approximately 8½ miles. Along the course of this canal there would be constructed a second reservoir consisting of about 920 land acres at Mad Creek, and a third reservoir at the east end of the canal of about 160 land acres on Geneva Creek. At that point there would be a drop of about 95 feet through a power plant to be constructed on land, and from there and through a sluiceway running downstream along the Mississippi River, the diverted water from the Cedar River would be taken and dumped into the Mississippi River below navigation dam No. 16 (R. p. 5, (167-168)).

The Cedar River is an inland river of Iowa and is a tributary of the Iowa river. The Iowa river is also an inland river of Iowa and flows into the Mississippi River. The junction of the Cedar River with the Iowa River is about 29 miles from the junction of the Iowa River with the Mississippi River. The proposed diversion dam would be located approximately 20 miles upstream on the Cedar River from its junction with the Iowa River. (R. p. 5, (153)). The Cedar River below the diversion dam would virtually be destroyed and at most would be nothing more than a mere rivulet except during spring thaws and rains. The only purpose of the proposed project is to construct an electric power plant to generate electric energy to be sold commercially. The

plan presented in the evidence and on the record does not include any transmission lines to carry the electric energy generated away from the plant. (R. p. 5, (161-171)).

A map prepared by the Bureau of Power of the Federal Power Commission and in evidence as Exhibit 1 of Exhibit No. 106 is reproduced on the last page of the Appendix, so that the Court may visualize and better understand the proposal.

Each of the petitioners herein filed petitions of intervention with the Federal Power Commission and were admitted to participation in the proceedings by that Commission. The Petition of Intervention of the State of Iowa and amendments thereto will be found in the Petitioners Record below beginning with page 6 and extending to page 28. (R. p. 5, (6-28)). The Objections of the Highway Commission of Iowa are set out in the Petitioners Record below beginning with page 32. (R. p. 5, (32)). The Petition of Intervention by the property owners directly affected is set out in the Petitioners Record beginning with page 39. (R. p. 5, (39)). The Board of Supervisors of Muscatine County, Iowa, in which County the project would be located, filed with the Commission a Resolution protesting the granting of the license. That Resolution is set out in the Petitioners Record beginning with page 44. (R. p. 5, (44)).

REASONS FOR REVIEW.

A review of the Opinion and decision of the United States Court of Appeals for the Eighth Circuit affirming the Orders of the Federal Power Commission complained of is necessary for the following reasons:

a. The action of the Federal Power Commission in affirmatively authorizing the construction of the proposed project, and the decision of the lower Court in affirming that Order, are violative of the Commerce Clause of the Constitution of the United States, and are in conflict with

fundamental principles stated in applicable decisions of this Court.

b. The Opinion and decision of the Court of Appeals is on an important question of Federal law which has not been but should be settled by this Court under the facts and circumstances of this case; said decision of the Court of Appeals has decided Federal questions in a way which is in conflict with applicable decisions of this Court; and the Court has sanctioned a departure from the usual course of judicial proceedings and hearings in that the Federal Power Commission denied the right of your Petitioners to present evidence and to be heard upon the question of the jurisdiction, power and authority of the Commission to affirmatively license and authorize the construction of the proposed project.

c. The United States Court of Appeals in this case has decided questions of extreme general importance and of substance relating to the construction and application of the powers granted to the Federal Government by the Constitution of the United States and particularly the Commerce Clause thereof, and such questions should be settled by this Court for the guidance, instruction and information of the respective States of the United States. Further, the Court of Appeals herein has not given proper effect to the prior applicable decisions of this Court and particularly the Opinion and Decision of this Court in *First Iowa Hydro-Electric Cooperative, Petitioner vs. Federal Power Commission, Respondent, State of Iowa, Intervenor,* 328 U. S. 152, 90 L. ed. 1143.

d. The underlying questions involved in this case are of great public importance, and the ultimate decision of this Court will determine the need, if any, for further Congressional action by Congress upon said subject matter.

QUESTIONS PRESENTED.

The specific questions presented are:

1. Whether the Court of Appeals erred in refusing and in failing to pass upon the constitutional and jurisdictional questions presented on the Review in that Court, and whether the Federal Commission erred in refusing to receive evidence upon and to pass upon the constitutional and jurisdictional questions pleaded and raised by your Petitioners.

The following are the specific matters which were presented and which your Petitioners submit should have been decided, and if decided according to your Petitioners' contentions, then the Orders of the Federal Power Commission complained of herein would resultantly be reversed and the application for a license would be dismissed.

a. The Cedar River is not navigable nor is it a water of the United States; the Federal Power Act is not applicable thereto; and the Federal Power Commission has no authority over said river for the following reasons:

(1) The Congress has declared that the Iowa River and necessarily its tributary, the Cedar River, "shall not be deemed a navigable water or public highway; but dams and bridges may be constructed across it", and thereby has relinquished control to the State of Iowa.

The State of Iowa plead and offered in evidence the Congressional Resolutions and Acts culminating in the Congressional Act approved August 18, 1894, (28 Stat. 356, USCA Title 33, Sec. 31) in words as follows:

> "So much of the Iowa River within the State of Iowa as lies north of the town of Wapello, and so much of said river within the State of Iowa which lies between the towns of Toolsboro and Wapello, in the County of Louisa, shall not be deemed a navigable water or public highway, but dams and bridges may be constructed across it."

(2) The power of Congress springs from the Commerce Clause of the Constitution of the United States which provides that Congress shall have power "to regulate commerce with foreign nations and among the several states". (Article I, Sec. 8). Congress has the power to declare what waters are or are not navigable waters of the United States. By said Congressional action the Federal Power Act is not applicable to and the Federal Power Commission has no jurisdiction over the Cedar River as such.

2. Whether the Federal Power Act as construed by the Federal Power Commission and by the Court of Appeals in this case is unconstitutional, or whether the action of the Commission in granting the license is an assumption of powers that are unconstitutional. The Federal Government has only the powers delegated to it by the States in the Federal Constitution. Under the Commerce clause of the Constitution, Congress has power only to regulate foreign and interstate commerce, and where no such commerce exists, there is no power. The proposed project is a single purpose project, for the generation of electric energy only, to be sold commercially by a private party, and no control or regulation of navigation or interstate commerce is involved.

Either the Federal Power Act is unconstitutional, if it be construed to extend the power of Congress over the Cedar River and over this project, such as to affirmatively authorize the construction of the project, or, the act of the Federal Power Commission in granting the license is in excess of its powers and is an unconstitutional act for the following reasons:

a. The Cedar River is an inland non-navigable water of Iowa and is not a public highway or water of the United States.

b. The proposed project is a single purpose project for the generation and sale of electric energy only, and has no

relation or connection with the preservation, betterment or development of interstate navigation or commerce.

c. The proposed generating plant will be constructed approximately 8 miles from the Cedar River and not on or near the Cedar River. Neither is it to be constructed on the Mississippi River. The plan calls for the diversion of the Cedar River by the construction of a diversion dam and the turning of the River at the dam through a canal to be constructed across land to the site where the power plant is to be constructed. The very nature of the project as shown by the undisputed record is not one in aid of navigation or of interstate commerce, and has no relationship to the fostering, perpetuation or preservation of interstate navigation or commerce.

d. The proposed project as described in the evidence and in preceding paragraph c. will destroy and forever prevent any interstate navigation or commerce from or into the Cedar River, for the reason that the lower twenty miles of the Cedar River will admittedly and without dispute, be destroyed. Also it will be physically impossible to provide interstate navigation and commerce from the Cedar River into the Mississippi River through the proposed canal for the reason that there is a vertical drop of 95 feet from the easterly end of the canal to the pool in front of the powerplant below, and it is certain that no locks can be constructed or operated to raise and lower vessels over the 95 foot drop at the eastern end of the canal. Any possible interstate navigation or commerce will be utterly and unquestionably destroyed.

e. The Federal Power Commission does not have power or authority to affirmatively authorize and to license the construction, and operation of the proposed project. The only power in the Federal Power Commission is a negative one, namely, to prevent or to regulate the dumping of water into the Mississippi River or the withdrawal of water from

the Mississippi River under any pumping arrangement which might be installed in connection with the project, so as to prevent any interference with navigation on the Mississippi River.

f. The State of Iowa has the only power, authority and jurisdiction existing over the Cedar River and the proposed project. The State of Iowa, through its laws, and particularly Chapter 469, Code of Iowa, 1946, has the sole power, jurisdiction and authority to affirmatively grant or to deny a permit to construct and operate the proposed project, subject only to the power of the Federal Power Commission to prevent, restrict or regulate the dumping of water into the Mississippi River, or the withdrawal of water from the Mississippi River, if and when the Federal Power Commission finds and determines that such will adversely affect navigation and commerce at that point on the Mississippi River.

3. Whether your Petitioners were and are entitled to have the issues heard and decided as to the power, authority and jurisdiction of the Federal Power Commission to affirmatively authorize and license the construction and operation of the proposed project in the light of and because of the propositions and reasons hereinbefore stated. Your Petitioners plead these jurisdictional and constitutional questions in the proceedings before the Commission, (Record 5, pages 6, 12, 13, 15 to 22, 29, 33) and tendered and described in the tender the evidence to sustain said propositions. (Record beginning page 22). Again after remand to the Commission of the case by this Court, your Petitioners by additional pleadings, raised said issues, (Record 5, (46, 47, 48, 56-65, 71 to 81)) and again tendered and offered proofs and evidence (Record 81, 82), all of which were rejected by the Federal Power Commission, and no opportunity was ever afforded to try out said issues.

4. Whether the findings of the Federal Power Com-

mission made in a prior and different proceeding by it, designated "DI 154", that the Commission has jurisdiction over the Cedar River and over the proposed project under the provisions of the Federal Power Act, are binding upon the Courts, and upon your Petitioners herein. The issue of the jurisdiction, power and authority of the Federal Power Commission is always available when raised, and it is always a question for the Courts to determine. The proceedings in DI 154 were ex parte, without judicial notice, and without due process, and are therefore not final and binding, and are subject to attack. In this proceeding before the Commission, and designated "Project No. 1853", your petitioners pleaded the jurisdictional issues, described the evidence available thereon in the pleadings, and tendered such evidence. Both the Commission and the United States Court of Appeals erred to the prejudice of Petitioners in denying your Petitioners a hearing thereon.

5. In the event only that this Court decides that the Commission has the power to affirmatively authorize this project, whether the Federal Power Commission ignored and violated the requirements of the Federal Power Act and particularly of Section 4(e) thereof in affirmatively authorizing and licensing the proposed project. The Court of Appeals erred in failing to consider and pass upon this question. Section 4(e) of the Federal Power Act empowers the Commission to issue licenses:

> "For the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project work *necessary or convenient for the development and improvement of navigation* and for the development, transmission and utilization of power across, along, over, or in any of the streams or other bodies of water *over which Congress has jurisdiction under its authority to regulate commerce* with foreign nations and among the several states." (Italics ours).

Further, said Section 4(e) provides that:

> "Whenever the contemplated improvement is, in the judgment of the Commission, *desirable and justified in the public interest for the purpose of improving or developing the waterway or waterways for the use or benefit of interstate or foreign commerce,* a finding to that effect shall be made by the Commission". (Italics ours).

As hereinbefore stated, the proposed project is concededly and admittedly a single purpose project, namely, for the generation and sale commercially of electric energy. The evidence unquestionably shows that no part of the project is "necessary or convenient for the development and improvement of navigation". Neither can it be stated under any excuse that the project is "desirable and justified in the public interest for the purpose of improving or developing the waterway or waterways for the use and benefit of interstate or foreign commerce". The project when constructed would destroy any possible navigation or interstate commerce into or from the Cedar River. The project is detrimental and injurious to navigation and commerce rather than beneficial. Therefore, the Federal Power Commission does not have the power and authority to license the proposed project in violation of these mandatory provisions of the Federal Power Act and particularly of Section 4(e) of the Federal Power Act.

The Federal Power Act does not empower the Commission to authorize the destruction of the lower Cedar River and the use of that River for navigation and commerce, nor does it authorize the use of the water of the Cedar River for power generation alone.

6. Whether the Federal Power Commission under the Federal Power Act has the power to grant to a private corporation for private uses, the waters of the Cedar River over the protests and objections of Iowa, especially since

the project undeniably will not benefit or aid navigation and interstate commerce, but on the contrary will be wholly destructive thereof. The Court of Appeals erred in refusing to pass upon this question, and by affirming the Order of the Federal Power Commission herein, that Court sanctioned this usurpation of power by the Commission, which we submit offends the requirements not only of the Federal Power Act, but of the Commerce Clause of the Constitution of the United States.

Iowa has the only original jurisdiction, power and authority to affirmatively license or permit the proposed project, subject only to the possible power of the Commission to prohibit or restrict the operation of the project, if it finds that it will adversely affect navigation and commerce upon the Mississippi River. The Iowa laws upon the subject are contained in Chapter 469, Code of Iowa 1946, formerly Chapter 363, Code of Iowa 1939, references to which are set out in the Appendix hereto.

7. Whether the Court of Appeals erred in its opinion in refusing to investigate and determine the charge of your Petitioners that the evidence was insufficient to sustain the findings by the Federal Power Commission, that the project is economically feasible. This question is now submitted to the Supreme Court in the event it is determined that the Federal Power Act is applicable to this project. The Court of Appeals in its Opinion refused to determine said question and as a reason therefore, stated that it could not substitute its judgment for that of the Commission upon debatable fact questions. The Court of Appeals is in error in taking this position, for the reason that the complaint of your Petitioners was and is that there is an utter absence and failure of evidence upon these economic issues, and that the Commission, because of the failure of evidence, erred in making such findings. Your Petitioners are entitled to have these questions determined from the Record.

The Commission found that the project was economically feasible, despite the fact that the Trial Examiner of the Commission who heard all of the evidence as the trier of the facts, found in his Report to the Commission, that the project was not economically feasible with present high construction costs; that there was no evidence adduced of any firm commitments for the financing of the project; that there was no evidence adduced as to any firm commitments for the sale of the energy to be generated; and that there was no evidence adduced showing any transmission line facilities available to transmit energy to prospective customers, if there be any. The Trial Examiner in his Report stated that "The issuance of a license is not justified by the Record as it now stands". These matters are set out by the Court of Appeals in its opinion, yet it abstractly refused to rule upon the sufficiency of the evidence. Economic feasibility is an important factor as to this project, because it is a single purpose project, namely, to generate electric energy to be sold commercially. Its economic success is necessary to justify the granting of the license. Your Petitioners are entitled to have these matters decided by the Court.

8. Whether the Federal Power Commission obeyed the mandate of this Court on the remand of this case to the Commission for further proceedings under the interpretation by this Court of the meaning and requirements of Section 9(b) of the Federal Power Act. If this project is subject to the Federal Power Act as assumed for the purposes of that review by this Court when this matter was before this Court previously, in *First Iowa Hydro-Electric Cooperative vs. Federal Power Commission*, 328 U. S. 152, 90 L. ed. 1143, then the Federal Power Commission should have required the promoters to submit satisfactory evidence under the provisions of Section 9(b) of the Act, that they had "complied with the requirements of the laws of the

State (of Iowa) with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license" under the Act. Upon the reopening of the case, the Commission refused to grant the petition of Iowa, among other things to take evidence under the provisions of said Section 9(b) of the Act, as interpreted by the Supreme Court on that review. (R. p. 5, (49, 52, 163)). The Commission refused to receive evidence of such compliance, and refused to give effect to a law of the State of Iowa requiring the promoters to secure a Certificate of Convenience and Necessity under the provisions of Chapter 246, Laws of the 52nd General Assembly of Iowa. (R. p. 5, (234, 235)). Attention is also again called to Chapter 469, Code of Iowa, 1946 (formerly Chapter 363, Code of Iowa, 1939) which we submit is applicable under the present record in this case. Consideration should have been given to the requirements of Chapter 489, Code of Iowa, 1946 (formerly Chapter 383, Code of 1939) requiring any operator of a transmission line to secure a franchise therefor from the Commerce Commission of Iowa. The Commission gave no effect and received no evidence upon any of these matters, and the Court of Appeals in its Opinion refused to decide said question. Your Petitioners are entitled to have these matters investigated and considered by the Commission in the light of the interpretation of Section 9(b) of the Act, if it is found by this Court that the project is subject to the Act.

9. Whether the provisions of the Act of August 14, 1946, amending the Act to Promote Conservation of Wildlife, Fish and Game, and for Other Purposes, approved March 10, 1934, 60 Stat. 1080, 16 USCA Secs. 661-666, must be given effect and compliance with the provisions thereof had before the Commission may grant a license for this project,

if this Court finds that the project is subject to the Federal Power Act. This Federal law requires that whenever waters of any stream are authorized to be impounded, diverted or otherwise controlled for any purpose by any department or agency of the United States, it shall first consult with the Fish and Wildlife Service and with the Head of such Service of the State wherein the impoundment or diversion occurs, so as to prevent loss or damage to wildlife resources. The law further requires reports and recommendations to be first received from the Secretary of the Interior and from the Head of such agency (in this case from the Iowa Conservation Commission) as to means and plans of protecting wildlife resources, which plans must be included in arriving at the cost of the project. The Commission ignored this requirement and the lower Court failed to correctly interpret the requirements of this Federal law. This conservation law means what it says and effect must be given thereto.

SUPPORTING BRIEF.

In support of this Petition for a Writ of Certiorari, your Petitioners submit the following brief:

1. The Federal Power Commission under the provisions of the Federal Power Act does not have the jurisdiction, power and authority to affirmatively authorize the construction of this project against and in spite of the protests and objections of the State of Iowa, its interested commissions, boards and agencies. The sole power of the Federal Government is that granted to it, by the States in the Commerce Clause of Section 8 of Article I of the Constitution of the United States. Congress has the power to declare what waters are navigable or are not navigable waters of the United States. Congress may accept and assume the power to regulate interstate commerce, or it may deny itself that power in particular instances, as stated by this Court in

International Shoe Co. vs. Washington, 326 U. S. 310, 315; 90 L. ed. 95, 101:

> "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." Citing cases.

Attention is called also to *Southern Pacific Co. vs. Arizona*, 325 U. S. 761, 769; 89 L. ed. 1915, 1925, where this Court said:

> "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, *** (citing cases) ***, or exclude state regulation even of matters of peculiarly local concern, which nevertheless affect interstate commerce (citing cases)."
>
> "***There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lands, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."

The Congress in conformity to the above stated principles by Congressional Act relinquished to the State of Iowa the control over the Cedar River and determined therein that the Iowa River, and necessarily the Cedar River, is not a navigable water or public highway of the United States, and authorized the construction of dams and bridges on said rivers under local control. Congressional Act approved August 18, 1894 (28 Stat. 356; 33 USCA Sec. 31). Said Act is in words as follows:

> "So much of the Iowa River within the State of Iowa as lies north of the town of Wapello, and so much of said river within the State of Iowa which lies between

the towns of Toolsboro and Wapello, in the County of Louisa, shall not be deemed a navigable water or public highway, but dams and bridges may be constructed across it."

Note from an examination of the map on the last page in the Appendix hereto that the Iowa River is an inland river of Iowa, and that the Cedar River is a tributary of the Iowa River and is also an inland river of Iowa. Note further that all of the river from Toolsboro upstream is included within the exclusion stated in the Congressional Act. Toolsboro is but three miles upstream from the junction of the Iowa River with the Mississippi River. It is plain that all of the Cedar River is excluded unquestionably from any possible control by the Federal Government. There are many other matters to be submitted sustaining this proposition upon the principal presentation when this Petition for a Writ of Certiorari has been granted.

Furthermore, the proposed project is admittedly and unquestionably a single purpose project, namely, to generate electric energy for sale commercially. There is no possible way that the project can be said to be in furtherance of, in aid of, or as protecting navigation or interstate commerce. The project is completely destructive of both. The Federal Power Commission in this case is attempting to assert jurisdiction over the Cedar River because it arbitrarily declared and found, in an ex parte preliminary proceeding, that the Cedar River is a navigable water of the United States, and that the Commission therefore has jurisdiction thereof. In its Order granting the license herein, it makes the bold arbitrary statement that it finds the project will benefit navigation and interstate commerce. Such finding is arbitrary, not founded upon any evidence, and is not true. This is a flagrant assumption and abuse of power by the Commission. The project involves a complete diversion and turning of the Cedar River through a canal or new channel to be con-

structed in order to move the Cedar River eight miles across land to a point where a drop of approximately 100 feet can be obtained, at which point the power plant would be located on land and the Cedar River taken to it. The power plant is not on the Mississippi River. It is some distance from the Mississippi River, and it is proposed to dump the diverted water of the Cedar River into the Mississippi River by means of a sluiceway running down stream parallel with the Mississippi River until it can be dumped below navigation dam No. 16 into the Mississippi River. Therefore, the plant is not located upon the Mississippi River either. This is a wholly intrastate local project located upon land wholly in Iowa. The dam is to divert the river eight miles to the plant. That is the sole purpose of the diversion dam in the Cedar River.

It is submitted that the Federal Power does not extend to this project because it is a local intrastate project. Chief Justice Marshall in *M'Culloch vs. Maryland*, 4 Wheat 316, 323; 4 L. ed. 579, 605, said:

> "The Congress may not, 'under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government' ".

Again in *Ashwander vs. Tenn. Valley Authority*, 297 U. S. 288 at 326; 80 L. ed. 688 at 700, this Court said:

> " 'All America understands and has uniformly understood,' said Chief Justice Marshall in Gibbons vs. Ogden, 9 Wheat 1, 190; 6 L. ed. 23, 68, 'The word "commerce", to comprehend navigation'. The power to regulate interstate commerce embraces the power to keep the navigable rivers of the United States free from obstructions to navigation and to remove such obstructions when they exist."

Also, in *Ashwander vs. Tenn. Valley Authority*, supra, the question was raised as to whether the Government could

enter into the business of selling electric energy generated at the dam in this project. It was noted however, that among other things, this project was authorized by an Act of Congress to be constructed and operated by Congress (not a private corporation as in the case at bar) to develop materials for use in case of war, and also that the project would benefit navigation in the Tennessee River. In answer to the challenge of the authority of the Government to develop and sell electric energy as a by-product of this project, this Court said:

> "And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States." (297 U. S. at 340; 80 L. ed. 707.)

Further, this Court in *Carter vs. Carter Coal Co.*, 298 U. S. 238, 296, 297; 80 L. ed. 1181, 1182, said:

> "The supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal clothed by that instrument with complete judicial power, and therefore, by the very nature of the power required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the Supreme law and reject the inferior statute whenever the two conflict."

In this case this project does not involve the protection or improvement of navigation or interstate commerce, but does involve the complete destruction thereof, if any exists. The Federal Power Act cannot be found to extend the power of the Federal Power Commission to affirmatively authorize the construction of this project. If it does grant such power to the Federal Power Commission it is unconstitutional be-

cause the Federal Government does not have that kind of power to grant.

As stated the proposed project is a strictly local power development project and this Court in *National Labor Relations Board vs. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30; 81 L. ed. 893, 907, said:

> "The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, between commerce 'among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system.*** Undoubtedly the scope of this power must be considered in the light of our dual system of Government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree" (301 U. S. 37; 81 L. ed. 911, 912). *** "It is said that this exercise of Federal power has relation to the maintenance of adequate instrumentalities of interstate commerce. But the agency is not superior to the commerce which uses it. The protective power extends to the former because it exists as to the latter." (301 U. S. 38; 81 L. ed. 912).

Attention is called also to the pronouncements of this Court upon the restrictions and limitations upon the Federal power in *Kansas vs. Colorado*, 206 U. S. 46, 88, 89; 51 L. ed. 956, 971; *United States vs. River Rouge Improvement Co.*, 269 U. S. 411, 419; 70 L. ed. 339, 345.

It has frequently been attempted to extend the power of the Federal Power Commission under misconstructions of the opinion of this Court in *United States vs. Appalachian Electric Power Co.*, 311 U. S. 377; 85 L. ed. 243. It will be noted that was an action by the United States to enjoin the

construction and maintenance of a dam in a navigable water of the United States by a private corporation for the purpose of generating and selling electricity commercially. The authority of the Government was challenged by the Company. What the Supreme Court said in that case must be viewed in the light of that approach. Obviously the United States Government has the power to prevent or to control and regulate the obstruction in the navigable river. Yet notwithstanding that the Supreme Court therein said:

> "As respondent soundly argues, the United States cannot by calling a project of its own 'a multiple purpose dam' give to itself additional powers, but equally truly the respondent cannot by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the river for commerce. To this general power, the respondent must submit its single purpose of electrical production." (311 U. S. 426; 85 L. ed. 262, 263).

In the case at bar the Cedar River is not a navigable water of the United States so declared by Act of Congress. The project will destroy any possible or assumed navigation or interstate commerce upon the river. The project is a single purpose project to generate and sell electricity. So obviously even though the Federal Government had jurisdiction over the Cedar River, it could not affirmatively authorize the construction of this project over and against the opposition of Iowa. Note in the *Appalachian* case the Government was objecting to the obstruction, not affirmatively authorizing the obstruction.

2. The Court of Appeals and the Federal Power Commission have assumed that the question of the jurisdiction, power and authority of the Federal Power Commission to affirmatively authorize the construction of this project was

settled by this Court when one phase of this case was before the Supreme Court in *First Iowa Hydro-Electric Cooperative vs. Federal Power Commission*, 328 U. S. 152; 90 L. ed. 1143. That case was on review upon a single proposition, namely, the construction and effect to be given the language of Section 9(b) of the Federal Power Act, which provided that the Commission should require an applicant for a license to present satisfactory evidence of compliance with the requirements of the applicable laws of the State of Iowa requiring a permit from the State Executive Council of Iowa as a prerequisite to the right of the Federal Power Commission to grant a license under the Federal Power Act. That was the sole question involved. The Federal Power Commission had denied the application for a license on this ground. The applicant took the case on review to the Court of Appeals of the District of Columbia, which Court affirmed the decision of the Power Commission, denying the license, and it was brought on review before this Court by writ of certiorari, and this Court reversed the Court of Appeals for the District of Columbia. It will be noted from a reading of the Opinion by this Court in that case, that no appeal or review was sought upon the jurisdiction, power or authority of the Federal Power Commission over the Cedar River and this project. The whole question was on the interpretation and construction to be given Section 9(b) of the Act. The Supreme Court in its Opinion assumed for the purposes of that case, that jurisdiction, power and authority existed in the Federal Power Commission over the project and over the river. No challenge was made on that question. The State of Iowa had won before the Federal Power Commission. The State of Iowa had won before the Court of Appeals of the District of Columbia. The State of Iowa had not sought a review. Therefore, the State of Iowa did not appeal and did not assert any grounds for review upon the question of the jurisdiction, power and authority of the

Federal Power Commission. As stated, the case proceeded on the assumption that the Federal Power Act was applicable. The recitals in the Opinion are all to that effect. All that this Court actually decided was that the Federal Power Act applied to any proposal to construct a project in a navigable water of the United States, and everything that was said in that Opinion was based upon that assumption. No such proposition was considered by the Court of Appeals, and it was not raised by any party on the presentation to the Supreme Court. This Court has consistently taken the position that no point will be considered by this Court upon a Petition for Certiorari unless that point was considered by the Court below, or presented in the Petition for Certiorari or in the response thereto.

Zellerbach Paper Co. vs. Helvering, 293 U. S. 172, 182; 79 L. ed. 264, 270;
Helvering vs. Wood, 309 U. S. 344, 349; 84 L. ed. 796, 799;
Washington, Virginia and Maryland Coach Co. vs. National Labor Relations Board, 301 U. S. 142, 146; 81 L. ed. 965, 969.

Counsel for the Respondent and the Intervenor contend that the findings by the Federal Power Commission in the former and prior proceeding designated before the Federal Power Commission as D.I. 154, in which the Commission found that it had jurisdiction over the Cedar River as a navigable water of the United States and over this project, that that is an adjudication, and that your Petitioners are bound thereby. That position is not sustained by the authorities. This question was before the Fourth Circuit Court of Appeals in *Carolina Aluminum vs. Federal Power Commission*, 97 Fed. (2) 435. Justice Parker in his opinion stated that the Declaration of Intention was filed to build a hydroelectric power project on the Yadkin River in North Carolina. After hearing the Commission held "That the interests of interstate or foreign commerce would be affected by such

proposed construction of the said project". As in the case at bar, no order was entered requiring the Petitioner to take or refrain from any action whatsoever, or granting or denying any form of relief. A petition for a rehearing was denied, and a Petition for Review was then filed in the Court and the Court ruled that it was given no power by Section 313(b) to review a mere finding as distinguished from an order of the Commission. This principle was affirmed in *Federal Power Commission vs. Metropolitan Edison Co.*, 304 U. S. 375, 82 L. ed. 1408. Also see *Houston National Gas Corporation vs. Securities and Exchange Commission*, 100 F. 2d 5, 6.

The findings made in D.I. 154 by the Commission were ex parte, without judicial notice or hearing, and did not preclude your petitioners from raising issues as to the jurisdiction, power and authority of the Commission to affirmatively authorize the construction of this project over the objections and protests of petitioners in this proceeding, known as Project No. 1853, before the Commission. As stated, these issues were pleaded time and time again and the Commission persistently refused to permit evidence to be taken upon it and refused to hear and determine the issues thus pleaded.

3. The Court below refused to pass upon the issue presented that the findings on economic feasibility by the Federal Power Commission were not sustained by any evidence. The Federal Power Commission found that the project was economically feasible; that there was evidence justifying the finding that the project could be financed, and that the project could be operated at a profit. The trier of the facts, the Trial Examiner of the Commission, found that there was not sufficient evidence to sustain any of these propositions, and recommended that the license be denied. The Court of Appeals disposed of the issue by stating that it could not substitute its judgment for that of the Commission

on debatable questions of fact. There are no debatable questions of fact upon these propositions. There is no evidence to show that there are any customers available to buy the current to be generated, nor to show the project could be operated at a profit. Neither is there any evidence to show that any financial institution or other party is willing to undertake the financing of the project, which it will be noted, must be financed completely one hundred percent by the sale of bonds to the public. There are no commitments or semi-commitments shown in the record. Therefore, the Court of Appeals erred in not passing upon this matter. The rule is well established that the Court must determine whether there is evidence which is legally sufficient for administrative action. If it finds that there is sufficient evidence the Court may not weigh it and the fact finding of the Commission stands, but if there is no evidence, the Court must say so and set aside the fact finding of the Commission.

Webre Steib Company vs. Commissioner of Internal Revenue, 324 U. S. 164, 173; 89 L. ed. 819, 828;
Consolidated Edison Co. vs. National Labor Relations Board, 305 U. S. 197, 229; 83 L. ed. 126, 140.

4. The Federal Power Commission was required by the Supreme Court on the remand of this case to require applicant to present satisfactory evidence of complying with the provisions of Section 9(b) of the Federal Power Act, as interpreted and construed by the Supreme Court in *First Iowa Hydro-Electric Cooperative vs. Federal Power Commission, et al*, 328 U. S. 152; 90 L. ed. 1143. That case was reviewed by the Supreme Court solely upon the question as to what was required and what was meant by the provisions of Section 9(b) of the Act. This Court held that the Commission had previously followed and had adopted an erroneous interpretation of Section 9(b) of the Act. The Commission refused and failed to take additional evidence although demand was made therefor by your Petitioners.

There are several laws of the State of Iowa which are applicable under the provisions of Section 9(b) of the Act.

The Federal Power Commission failed to give effect to and the Court of Appeals erred in refusing to find that the Commission failed to give effect to certain Iowa statutes as required by Section 9(b) of the Federal Power Act. Section 469.30, Code of Iowa 1946, formerly Section 7769, Code of Iowa 1939, requires the applicant to secure a permit from the State Commission to flood public highways or state-owned lands. The applicant must show that it has a permit from the State Highway Commission because beyond dispute and admittedly the main reservoir will flood several primary highways and main highways. Further, Chapter 246 of the laws of the 52nd General Assembly of Iowa requires that the Intervenor herein must first secure a Certificate of Convenience and Necessity from the Executive Council of the State of Iowa in order to engage in the business in Iowa of maintaining and operating a hydro-electric generating plant. That is a law referred to in Section 9(b) of the Act, and the Commission and the Court failed to give consideration thereto. See the law set out in Petitioners' Record below, Page 234.

Further, the project plan does not call for any transmission lines. It will be necessary for the applicant or someone else to secure a franchise to operate a transmission line from the plant before the electric energy can be sold and distributed. Section 489.1, Code of Iowa 1946, formerly Chapter 383, Code 1939, requires any individual or Company which desires to erect, maintain or operate any transmission lines along any public highways to first secure a franchise from the State Commerce Commission. That statute was also ignored.

Your Petitioners are entitled to have the Courts determine whether the failure of the applicant to follow the

requirements of Section 9(b) of the Federal Power Act as interpreted by this Court, constitutes error.

5. There are several other propositions which have been set out in the questions presented for review. However, we will not extend this brief by making any further presentation in connection therewith. We believe that we have stated sufficient supporting information herein to justify and warrant the Court in granting the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit. On the submission in chief all of these matters can and will be more elaborately presented.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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APPENDIX TO BRIEF.

Provisions from Iowa Law.

The following excerpts from the Iowa Law, Chapter 363, Code of Iowa 1939, now Chapter 469, Code of Iowa 1946 are sufficient for the purposes of this review:

> "469.1 Prohibition—permit. No dam shall be constructed, maintained or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."

Section 469.2 prescribes what an application for permit must contain.

Section 469.3 prescribes notice of hearing.

Section 469.4 prescribes the hearing.

> "469.5 When permit granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe."

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CHARLES ELMOR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 760.

STATE OF IOWA,
CONSERVATION COMMISSION OF IOWA,
HIGHWAY COMMISSION OF IOWA,
GEORGE CORRIELL, et al.,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE,
Intervenor.

PETITIONERS' REPLY TO OPPOSITION BRIEFS.

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MAY 1950.

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PETITIONERS' REPLY.

STATEMENT.

Your Petitioners received a copy of the Brief by the Federal Power Commission, the Respondent herein, on May 22, 1950, and received the Brief by the Intervenor on May 20, 1950.

It is our understanding that in preparing a Petition for a Writ of Certiorari it is not expected or intended that the propositions relied upon for a review shall be presented and argued in extenso. It is also our understanding that petitioners are required merely to state the propositions

justifying and warranting the consideration of this Court on review, and to make sufficient explanation thereof to show that the questions are properly raised and are involved in the case. It is possible that this Court, after granting the writ and upon review, will disagree with the validity of our propositions, but we are firmly convinced that when the matters involved in this case are considered by this Court upon review, that Petitioners will prevail.

Certain statements made by both the Respondent and the Intervenor in their Briefs in opposition to the Petition for a Writ of Certiorari make necessary a Reply more in the nature of a sampling of the argument to be made on review, than a mere showing to this Court that there are propositions that are meritorious and deserving of review by this Court on certiorari. Your Petitioners do not desire to unduly extend this Reply, but because of the great importance of the questions involved, feel that we should not take any chances on not adequately informing the Court as to the reasons and record against the assertions by Counsel for Respondent and for Intervenor in their opposition Briefs herein.

Both Respondent and Intervenor in their Briefs ignore and overlook outstanding and important grounds asserted by your Petitioners requiring a review by this Court. There are fundamental constitutional questions involved herein which require the thorough consideration of this Court, and which were ignored by both the Federal Power Commission and the Circuit Court.

We, therefore, in our anxiety to properly and adequately represent the sovereign State of Iowa and those associated with it in this proceeding, desire only to be sure that this Court is fully informed as to these matters.

THE COMMISSION'S FINDINGS OF JUNE 3, 1941.

Both the Respondent and the Intervenor state that in the prior and separate proceeding, known as F.P.C. Docket No. D.I. 154,[1] the Intervenor, on January 29, 1940, filed a Declaration of Intention to construct a 15,000 kilowatt *run-of-river* hydro-electric project. Both state that the State of Iowa was notified by letter dated February 7, 1940, addressed to the Governor, of the filing of this Declaration of Intention. The Respondent states no reply was received thereto. There is no evidence that such a letter was ever received by the Governor of Iowa, and the writer of this Brief shortly after he entered this case, made an investigation to determine whether any such a letter was received, and found that there was no record of its receipt and the then Governor, later United States Senator, Geo. A. Wilson stated that he not recall ever having received it. In any event, it is not claimed that this was an official notice of any hearing upon the matter. No notice was required by the Federal Power Act.

Subsequently on April 2, 1941, it is stated, the original Declaration of Intention describing the run-of-river project, was amended such as to substantially change the project to one involving a diversion of the Cedar River easterly through a canal to the power plant to be constructed on land, and then the water was to be discharged through a sluiceway into the Mississippi River. Respondent states in its Brief that since it received no reply to the so-called letter of February 7, 1940, it "did not advise the Iowa officials of the supplement to the Declaration filed on April 2, 1941." Both state that on June 3, 1941 the Commission entered its Findings in D.I. No. 154 under and through which it sub-

---

[1] The case at bar was begun by the filing on August 11, 1941 with the Commission, an application for license to construct the revised project, and their case was docketed as F.P.C. Docket Project No. 1853.

sequently assumed and asserted jurisdiction in this the later case.

Both state that a copy of the Findings of June 3, 1941 was sent to the Iowa Commerce Commission, and that no response was received from and nothing done by the Iowa Commerce Commission. No reason is given why a copy of these Findings were sent to the Iowa Commerce Commission. Under the Iowa law, the Iowa Commerce Commission has never had jurisdiction over or any connection with the waters and rivers in the State, nor does it have regulatory control over hydro-electric projects. The only official agency of the State which has jurisdiction and supervision over all waters and streams located in the State is the Iowa Conservation Commission. The Executive Council of Iowa is the official body which had jurisdiction to authorize the construction of dams and projects upon and in the waters and rivers in the State. These are the only two State agencies having anything to do with the rivers in the State under the laws of Iowa. It is not known whether the copy of those Findings was ever received by the Iowa Commerce Commission. If it did receive it, the Commission had no official interest therein.

The Respondent and the Intervenors state that the Declaration of Intention was filed by Intervenor under the provisions of Section 23(b) of the Federal Power Act. That section does not provide for the holding of any hearings or the serving of notices upon anybody. All it provides is, that when the Declaration of Intention is filed with the Commission, it shall cause immediate investigation of such proposed construction to be made and make its findings. Therefore said proceeding cannot effect finality. No State, public body, or person is bound thereby, save possibly the party filing the Declaration of Intention. The only result of the Findings of June 3, 1941 was to require the First Iowa to file a formal application for a license under the

other provisions of the Federal Power Act. If First Iowa had elected not to do anything, then said Findings of the Commission of June 3, 1941 would not have had any effect one way or the other.

As stated in our Petition for a Writ of Certiorari at the bottom of page 23, the very same question as to whether such Findings by the Commission are a final order and are binding upon other parties who may be interested in the later application for a license, was before the Fourth Circuit Court of Appeals, in *Carolina Aluminum vs. Federal Power Commission*, 97 Fed. (2) 435. In that case an attempt was made to appeal from just such Findings as the Findings of June 3, 1941. There the Court said, referring to those Findings and distinguishing them from an Order, the following:

> "It is an Order and not a finding of the Commission that the Court is authorized to review; and there would seem to be little room for doubt that by an Order is meant some command of the Commission directing or restraining action or granting and denying some form of relief," * * *
>
> "An Order of the Commission is analogous to the judgment of the Court; and it is well settled that a finding constitutes no part of the judgment even though incorporated in the same instrument with it."
>
> "In reviewing the Order the Court may examine the findings to determine whether they support the Order, and may examine the evidence to determine whether it supports the findings; but the Court is given no authority to review a mere finding upon which no Order is based, even though it may determine a status which may form the basis of future governmental action, for even such a finding lacks the fundamental characteristics of an Order."

Thus in the case at bar, the Findings of the Commission on June 3, 1941 in Docket D.I. 154 are not a final order. At most they are Findings upon which the Commission subsequently in this proceeding docketed as Project No. 1853 now on review before this Court, made its final order granting the license to the Intervenor herein, and which obviously is a reviewable order. As stated in the last paragraph of the quotation above, the Commission in the proceedings at bar, used and adopted the "Findings" in the prior proceeding, D.I. 154, and the Courts in reviewing the order of the Commission granting the license may examine the Findings (including the Findings in D.I. 154) to determine whether they support the order, and may also examine the evidence to determine whether it supports those Findings. Although a status was determined by those Findings of June 3, 1941 in D.I. 154, there was no order utilizing those Findings until the final order of the Commission granting the license herein, and of which complaint is made.

The provision in the law authorizing review by the Courts to-wit: Section 313(b) of the Federal Power Act, provides only for review of an "order issued by the Commission."

This principle of law was confirmed in *Federal Power Commission vs. Metropolitan Edison Company*, 304 U.S. 375 at Page 384, 82 L.ed. 1408, 1414, where it was said:

> "The provision for review thus relates to an order of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."

As stated, in arriving at the Findings of June 3, 1941, there was no hearing, no judicial notice, no due process, and no order. The Commission having adopted said Find-

ings in these proceedings, cannot shut the door and say that it will not permit those Findings of June 3, 1941, and the evidence upon which they were founded, to be reviewed, challenged or attacked. Those Findings are subject to review, and the jurisdiction, power and authority of the Federal Power Commission based upon those Findings are most assuredly reviewable by the Courts at the time they are adopted in any final order. If not, then fundamental rights guaranteed by the Constitution have been destroyed.

It is admitted by both the Respondent Commission and the Intervenor that no hearing was permitted or afforded as to the jurisdiction, power and authority of the Federal Power Commission, to affirmatively authorize the construction of the proposed project in this proceeding, although said issues were pleaded in the original Petitions of Intervention and in subsequent Motions and pleadings by the State of Iowa. In every instance the Commission refused to permit said issues to be presented, refused to take evidence thereon, and refused to pass upon or determine said issues in this proceeding. Tenders of evidence were made to inform the Commission that unchallengeable evidence is available and exists to show that the Commission does not have the power and authority to affirmatively license and authorize the construction of this project over and against the objections and protests of the State of Iowa. That evidence is overwhelming and without dispute that the Commission does not have jurisdiction, power or authority to license the proposed project. The Courts cannot shut the door upon such issues, and must afford the Petitioners an opportunity to be heard thereon. There is and was no res judicata. See the late case of *United States v. U. S. Smelting, R. & M. Co.*, decided by this Court March 27, 1950, in 94 L.ed. Advance Opinions, 488, at p. 496.

THE PRIOR SUPREME COURT DECISION.

Both the Respondent and the Intervenor in argument insist that this Court finally disposed of the jurisdictional question for all time, and that the question could not in the subsequent proceedings in this same case before the Commission after the decision of this Court and on remand, be challenged, raised or decided. The Circuit Court followed the Respondent and Intervenor off the deep end on this proposition. It is submitted that if that opinion by this Court is read in the light of the sole question there submitted for review, no such finality can be gleaned therefrom.

It will be noted that the Commission on January 29, 1944 after holding certain hearings, dismissed the application for a license herein, on the sole ground that the applicant had not "presented satisfactory evidence pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of the applicable laws of the State of Iowa". It mattered not to the State of Iowa and others interested in the dismissal of the application, upon what ground the petition was dismissed, just so long as it was dismissed. If the petition was dismissed and no license issued, then there was nothing for the State of Iowa to contest. If the Courts had sustained the dismissal by the Commission, then there would have been nothing further to complain of. It would then not matter whether the Commission claimed jurisdiction, power and authority over the project or not under those circumstances. The Court of Appeals for the District of Columbia on review, did affirm that order, but this Court reversed it and remanded the case for further proceedings. That Petition for Review was by First Iowa and challenged the order of the Commission by asserting only that the Federal Power Act superseded the laws of the State of Iowa referred to by the Commission as not having been complied with. This Court then held that those particular Iowa laws were unenforce-

able and not such laws as were meant and intended to be complied with by the provisions of Section 9(b) of the Act. That was all that was before this Court.

Obviously that order of the Commission dismissing the application, was on the assumption that it had jurisdiction. This Court took the case in that condition and with those assumptions as the background for the order being reviewed. This Court in the Opinion (328 U.S. 152 at 163, 90 L.ed. 1143 at 1149 stated:

> "The findings made by the Commission on June 3, 1941, in response to the Petitioners' Declaration of Intention *are not in question.* For the purposes of this application it is settled that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, each of which has been determined to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction, a license from the Commission. The project is clearly within the jurisdiction of the Commission under the Federal Power Act." (Italics ours)

The recital just quoted includes a paraphrase of the Findings of June 3, 1941, and as stated by the Supreme Court, those Findings in the proceeding before the Supreme Court were not in question. Therefore, the Supreme Court proceeded upon the assumption of jurisdiction because of that status of the case.

Immediately following the last above quotation, the Supreme Court stated that the issue was only, as follows:

> "The question at issue is the need, if any, for the presentation of satisfactory evidence of the Petitioners' compliance with the terms of Chapter 363 of the Code of Iowa. This question is put in issue by the petition for review of the order of the Commission, which dismissed the application solely on the ground of the failure of the petitioner to present such evidence."

Obviously everything that the Supreme Court said in its Opinion, is upon the assumption that the Commission had jurisdiction, because that issue was not challenged and was not properly before the Court at that time.

The question of the jurisdiction, power and authority of the Commission to affirmatively authorize and license the construction of this project under the circumstances of this case, is properly before this Court, and this Court is bound to recognize the right of the Petitioners herein to have this question reviewed, and to have their day in Court.

The question decided is the construction and interpretation of Section 9(b) of the Act. None other. The Supreme Court decided that the Federal Power Act, (on the assumption that the Act was applicable and under the circumstances of that review,) superseded the State laws referred to by the Commission, and that therefore compliance with those State laws was not required. Anything else in that Opinion is dicta.

Upon the reopening of the case after the remand by this Court, the further proceedings were in effect and in fact a continuation of the hearings from the point immediately before the issuance of the dismissal order by the Commission. Therefore in the further proceedings, the State of Iowa and those associated with it had the right to challenge the jurisdiction, power and authority of the Commission, and had the right to be heard thereon by the Commission. The record is full of attempts and requests by the State of Iowa to be heard upon that issue. Yet the Commission arbitrarily, and in fact belligerently, refused to consider the issue, to take evidence, or to decide the question in the light of the unchallengeable evidence described and tendered to the Commission, which evidence unquestionably shows beyond dispute that the Commission does not have the jurisdiction, power and authority to affirmatively license this project over and against the pro-

tests and objections of the State of Iowa and those associated with it. This Court cannot deny due process to the petitioners herein upon this question.

CONSTITUTIONAL QUESTIONS.

Constitutional questions are always available and the Petitioners herein are entitled to a review by this Court of these questions as submitted in the Petition for a Writ of Certiorari.

Your Petitioners have challenged the constitutionality of the Federal Power Act, if it be construed to authorize and empower the Federal Power Commission to affirmatively authorize and license the construction and operation of the proposed project over and against objections of the State of Iowa and those associated with it. As stated, the project is not in the interests of interstate commerce, and the Order of the Commission, regardless of the arbitrary, capricious and unsubstantiated findings made by the Commission in connection therewith, is in excess of the power which the Federal Government has under the commerce clause of the Constitution.

Also, the Act of the Federal Power Commission in making its order affirmatively authorizing and licensing the construction and operation of the proposed project is an unconstitutional assumption of the power not given to the Federal Power Commission by the Federal Power Act, and not permitted by the Commerce Clause of the Constitution. The exercise of this power by the Commission is arbitrary, unconscionable and unconstitutional. The Commission is using its assumed power to destroy the Cedar River an inland river in Iowa, for private purposes, for private individuals, and for the single purpose of generating electric energy for sale commercially. This is not authorized or permitted by either the Commerce Clause of the Constitution or the Federal Power Act.

Constitutional rights and constitutional questions are always reviewable.

St. Joseph Stockyards Co. vs. United States, 298 U.S. 38 at 52; 80 L.ed. 1033, 1041. There this Court among other things said:

> "But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded."

ECONOMIC FEASIBILITY.

Respondent contends that the fact that there was no evidence adduced upon the necessary elements that there must be firm selling contracts and firm commitments to finance the project, is not controlling, and that the Finding by the Commission that the project is economically feasible meets all requirements. Respondent argues that the Act's sole requirement as to economic feasibility is contained in Section 10(a) which provides that the project "shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways *for the use or benefit of interstate or foreign commerce* for the improvement and utilization of water power development," etc. (Italics ours)

Note that the language quoted by the Respondent in its Brief from Section 10(a) says that the project must be one "best adapted to a comprehensive plan for the improving or developing a waterway for the use or benefit of interstate or foreign commerce". That is the primary and first legal

consideration. As previously stated, the admitted, undenied facts are that if this project is built, there can be no interstate commerce or navigation into or from the Cedar River. The plan proposed would preclude any possible arrangement by which watercraft could be transferred from the Mississippi River to the Cedar River and vice versa.

It will be noted further, that the Commission has a further obligation expressed and stated in Section 4(e) of the Act. It is there provided that the Commission shall have power to issue licenses for certain limited purposes, primary among which is the following:

> "For the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project work *necessery or convenient for the development and improvement of navigation* and for the development, transmission and utilization of power across, along, over, or in any of the streams or other bodies of water *over which Congress has jurisdiction under its authority to regulate commerce.*" etc. (Italics ours)

The foregoing quotation is a mandate to the Commission to require evidence as a foundation for the issuance of its license that the requirements set out in the quotation have been met, the first of which is "for the development and improvement of navigation", and then only in waters "over which Congress has jurisdiction under its authority to regulate commerce". In the case at bar there is no room for argument or dispute, nor is there conflict in the evidence, that the construction of the project will destroy navigation from and into the Cedar River, and that the project is a single purpose project, namely, the granting of a license to private individuals to exploit the waters of the Cedar River for the sole purpose of developing power to sell commercially. There is no evidence in the record anywhere that there could be any possible navigation through, around

or over the power plant and the 100 foot drop at the power plant, and through the sluiceway from the power plant for several thousand yards to a point where the water is dumped into the Mississippi River. It is ridiculous to assume or to create a fiction under the record in this case that there is any possible development and improvement of navigation involved. There is an utter absence of evidence thereon, and as stated, the very nature of the project conclusively and without dispute, shows that navigation is destroyed and prohibited rather than developed and improved by the project.

Furthermore, in Section 4(e) of the Act, it is provided:

> "Whenever the contemplated improvement is, in the judgment of the Commission, *desirable and justified in the public interest for the purpose of improving or developing the waterway or waterways for the use or benefit of interstate or foreign commerce*, a finding to that effect shall be made by the Commission". (Italics ours)

Counsel for Respondent in their Brief in opposition ignore and omit the foregoing quotation which is a mandate in the law. This requires that the finding must be "in the public interest". What is the public interest? Attention is called to what this Court had to say about it in *United States of America, et al vs. Frank O. Lowden, et al.*, 308 U. S. 225, at 230; 84 L. ed. 208 at 213.

The language quoted from Section 4(e) of the Act is that the project must be found to be "desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce". That means that interstate commerce is of primary importance and in truth, it should be because the only authority the Commission has is under the Commerce Clause of the Constitution. Under the undenied, undisputed facts in this case, the Commission cannot honestly make a finding that this project is in the

public interest for the purpose of improving or developing the Cedar River for the use or benefit of interstate or foreign commerce. Neither can it find that it is necessary to divert the water of the Cedar River into the Mississippi River to make it more navigable. There is no evidence in the record upon either proposition. Therefore, the Commission has arbitrarily, without foundation in the record, and without the benefit of any evidence in the record, made the finding quoted in its Brief at the bottom of page 14. This mistatement by the Commission alone justifies and requires an investigation by this Court into the doings of this Commission.

Again on page 15 of Respondent's Brief, Respondent refers to the fact that it made a finding that "The proposed project is best adapted to a comprehensive plan for improving and developing the Cedar and Mississippi Rivers for the use and benefit of interstate commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes."

Again we say to this Court that there is an absolute absence of evidence to justify at least the first part of this finding, namely, that the proposed project is best adapted to the comprehensive plan for improving and developing the Cedar and Mississippi Rivers for the use and benefit of interstate commerce. There is not one scintilla of evidence in the record upon the subject. This is a capricious, arbitrary finding without any foundation whatsoever. The sufficiency of the evidence to sustain the other statements in the "finding" is also disputed.

Counsel for the Respondent blandly say that these mere findings clearly meet the requirements of the law, and that the Petitioners do not claim that these findings are not supported by substantial evidence and are therefore conclusive. This is an absolute misstatement of the record. One of our principal attacks upon the order granting the license and

upon the project is that it is destructive of interstate commerce and of navigation, and that it absolutely eliminates any possible navigation into and from the Cedar River. Therefore, these matters are subject to review, and this Court must investigate the evidence in the case to determine whether or not there is any evidence upon which such findings could be made. If there is no basis for the findings, then the order complained of, which is the result of these findings, must be set aside and held for naught. The State of Iowa and those associated with it are entitled to have these matters investigated by this Court.

The citations of cases by counsel to sustain their proposition may be correct as abstract statements of the law, but they have no application here.

Counsel further states that the findings as to other aspects of economic feasibility, including marketability of electricity and commitments to finance, are not statutory requisites to the issuance of a license. That they are only factors among others which the Commission considers. In this connection attention is called to the first order of the Commission authorizing the issuance of a license dated December 19, 1947. (R. 5 (91)). In paragraph (11), the Commission thought it important enough to provide that a license be issued for the construction, operation and maintenance of the project provided among other things, that within nine months from the date of the order, unless otherwise ordered by the Commission, the authorization shall terminate "if the applicant fails to submit satisfactory evidence of commitments to finance construction of the project". That became one of the important basic factors in the case as is shown by the Commission's own order. Then the Secretary of the First Iowa under date of August 31, 1948 wrote a letter to the Commission with which it enclosed a letter from a firm designated as "McDougal & Condon, Incorporated", dated August 30, 1948 (R. 5(97, 98)). It will be noted that that

letter is directed to the First Iowa, not the Commission, and merely states that they feel that the obligations which the Corporation can issue for construction purposes will be marketable and that when the license shall have been issued, they would be glad to proceed with the completion of the financing program. That is accepted by the Commission as evidence. No opportunity for cross-examination, no hearing upon it, not anything. Note that this letter does not commit McDougal & Condon to anything. There was also attached a letter from Mr. William J. Neal, Acting Administrator of the Rural Electrification Administration dated August 31, 1948, directed to the First Iowa, stating only that in his opinion a market for the sale of power to R. E. A. Co-operatives in the area exists and will exist in the future, if energy is made available at sufficiently low cost. That is submitted as evidence also as to the marketability of the proposed project. That too is but the expression of a mere opinion, is not evidence, and has no foundation whatsoever in the record. The Federal Power Commission, over the dissent of its Chairman, accepted these flimsy letters as evidence, and on September 8, 1948, modified its order of December 19, 1947 by removing the condition that the applicant present satisfactory evidence of commitments to finance the project within nine months, and made a finding that the First Iowa "has submitted satisfactory evidence of commitments to finance construction of the project", (R. 5(107)) and ordered that a license issue forthwith. Mr. Smith, Chairman of the Commission, dissented (R. 5(109)). In his dissent, Mr. Smith stated:

> "The Commission's regulations governing applications for major project licenses require, among other things, a showing of the proposed use or market for the power to be developed and a statement or explanation of the proposed method of financing. The materiality and interrelationship of these factors in their bearing upon economic feasibility are apparent from the testimony

during the hearings, are emphasized in the Examiner's Report served January 30, 1947, and are pointed out in the Commission's Opinion No. 162. They are reflected also in the letters to First Iowa from the Chicago banking firm of McDougal & Condon and from the Acting Administrator of the Rural Electrification Administration, dated respectively August 30, and August 31, 1948, upon which the present action of the majority is in part based. * * *

"Although certain general comments and expressions of interest in the purchase of the power and in the financing of the project have been submitted in the letters referred to above, the record is now no more specific in these respects than heretofore. The Commission has no more adequate or definite basis than it had in December 1947 for arriving at conclusions concerning the economic feasibility of the enterprise."

Also the Trial Examiner, the trier of the facts in his report to the Commission upon his trial stated: (R. 5, (83-86))

"In the present proceeding there has been no attempt to show that any firm contracts have been made or that any definite commitments have been made for purchase of any portion of the power." (P. 83).

"The Applicant's plan of financing (as outlined in Exhibit G to the application) provides for sale of 40 year, 4 percent revenue bonds for the whole cost of the project. The proposed project could be financed by the issue of revenue bonds upon a 4 percent basis and amortized over a 30-year period if the Applicant had binding contracts for the sale of electric energy for a period of approximately 10 years, with sufficient operating revenues assured to cover the estimated cost of operation, maintenance, reserves and 133 percent of the debt service. But it has no firm sales contracts at all and no such assurance of revenues. Neither does the Applicant have any firm commitments for financing. (P. 85)

"The Applicant has not, up to the present time, shown the proposed project to be economically feasible with present high construction costs. Neither has it shown any firm commitments for the financing of the project or for the sale of the energy to be generated. Furthermore, it has not shown what facilities, if any, will be used to transmit such energy to prospective consumers. Although the application states a proposal that transmission lines should be constructed by a transmission cooperative, as a separate project, no evidence of the existence of either transmission cooperative or project for transmission lines has been offered."

"The issuance of a license is not justified by the record as it now stands." (P. 86)

The trier of the facts, as noted from the quotations above, found that there was no evidence in the record upon these matters, that they are necessary factors, and that therefore, the failure of proof leads to no other conclusion than that the proposition is economically infeasible. Notwithstanding this state of the record, the Commission arbitrarily and surreptitiously made the findings referred to that the project is economically feasible based upon the flimsy statements in the letters from McDougal & Condon and from the Acting Administrator of the Rural Electrification Administration.

Counsel for both Respondent and the Intervenor cite cases on abstract legal propositions with which we have no quarrel. We do challenge their applicability to the situations in the case at bar. We well realize that Section 313(b) provides that the findings of the Commission as to the facts, *if supported by substantial evidence,* shall be conclusive. Our complaint is that these salient propositions are not supported by any evidence, but are arbitrary findings and statements made by the Commission without foundation in the record. If upon review, this Court finds that the Petitioners are correct and that primary and principal

elements entering into economic feasibility are not sustained by any evidence, then the Petitioners should prevail as to these matters. This Court has no alternative than to grant our Petition for a Writ of Certiorari, and then upon review, it is for this Court to determine whether or not Petitioners are correct in their position.

The cases sustaining our position are many. We will cite only a few.

See *Consolidated Edison vs. National Labor Relations Board*, 305 U. S. 197, 229; 83 L. ed. 126, 140. There the Court said:

> "We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence * * *. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
>
> "But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." (305 U. S. 230; 83 L. ed. 140.)

See *Webre Stibe Co. vs. Commissioner of Internal Revenue*, 324 U. S. 164 at 173; 89 L. ed. 819 at 828, where this Court said:

> "We must determine whether there is evidence which is legally sufficient for administrative action but we may not weigh it."

See also *Shields vs. Utah Cent. R. Co.*, 305 U. S. 177 at p. 185; 83 L. ed. 111 at p. 117. *United States vs. Carolina Freight Carriers Corp.*, 315 U. S. 475, 489; 86 L. ed. 971, 982.

THE ACT OF AUGUST 14, 1946—CONSERVATION OF WILD LIFE.

Counsel for both the Commission and the Intervenor overlook the purport and the meaning of the Act of August 14, 1946, (60 Stat. 1080, 16 U. S. C. A. 661) relating to the protection and conservation of wild life. That law became effective on August 14, 1946 and requires that before a Federal permit can be granted to divert any river, the Federal Power Commission must first consult with the Fish and Wild Life Service and "the head of the Agency exercising administration over the wild life resources of the State" where the diversion occurs, with a view to preventing loss or damage to wild life resources, and the reports and recommendations of the Secretary of the Interior and of the Head of the Agency exercising administration over the wild life resources of the State based on surveys and investigations conducted by them, for the purpose of determining possible damage to wild life resources and of the means and measures that should be adopted to prevent loss and damage to wild life resources "shall be made an integral part of any report submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects." It is further provided in the law that "the cost of plans for the construction or installation and maintenance of any such means and measures shall be included in and shall constitute an integral part of the cost of such projects." These provisions have not been complied with by the Federal Power Commission, and the Conservation Commission of Iowa which is charged by the Iowa law with the conservation of wild life, fish and game has never been contacted by the Federal Power Commission, or requested to make such a survey and recommendations in connection therewith. The Commission attempts to get around this by providing in its order that the licensee shall make such

provision as may be required by the Secretary of the Interior in this regard. But the order ignores the State agency completely. We submit this is not sufficient and that the Federal Power Commission cannot blandly ignore the Act of Congress.

The Respondent in its brief, page 18, refers to the fact that the Iowa Conservation Commission was permitted to intervene in these proceedings and that a Mr. Schwob and a Dr. Bailey testified with regard to fish life in the area and the effect of the project thereon. Then counsel for the Commission states that they were given an opportunity to make any recommendations they desired in connection with the issuance of the license. What counsel for the Commission does not tell this Court is that these two men testified in 1942, four years before there ever was such a law. It seems peculiar that counsel would try to take advantage of that incongruous situation. Furthermore, counsel in argument, state that the Chief Biologist for the Conservation Commission testified at the 1946 hearing, but was not prepared to make any recommendations. The Power Commission had not requested the Iowa Conservation Commission to prepare or submit plans. The Power Commission is now trying to hide behind this flimsy reasoning to avoid compliance with the mandatory provisions of the Act of Congress referred to. This Court needs to investigate this matter too.

FAILURE TO COMPLY WITH SECTION 9(b).

The Petitioners cite error on the part of the Federal Power Commission in refusing to give proper consideration to, and to observe the provisions of Section 9(b) of the Federal Power Act, as interpreted and construed by this Court in *First Iowa Hydro-Electric Cooperative vs. Federal Power Commission, et al.*, 328 U. S. 152; 90 L. ed. 1143. In that case this Court gave a different interpretation and

meaning to Section 9(b) than did the Commission in its order of January 29, 1944. Both the Respondent and the Intervenor pass over this matter lightly by stating that this Court ruled that the Commission did not have to give any consideration to the Iowa laws because they were superseded by the Federal Power Act. That is not what this Court said. This Court remanded the case to the Federal Power Commission for further proceedings under the construction and interpretation given Section 9(b) by this Court in that opinion. That did not mean that Section 9(b) could be ignored entirely. If so, this Court would have said so. Your Petitioners pointed out in Division 4 of the Petition herein, beginning on page 25, that there were Iowa laws such as are referred to by this Court in its opinion and which the Commission refused to take any note of and refused to hear evidence on. Section 9(b) is a statutory guide rule and must be observed by the Commission. This Court said in *United States vs. Carolina Freight Carriers Corporation*, 315 U. S. 475 at 489; 86 L. ed. 971 at 982, the following:

> "Congress has made a grant of right to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from these standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided by judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed these statutory standards."

So this Court has no other alternative than to investigate the failure of the Commission to observe the requirements of Section 9(b) of the Act.

CONCLUSION.

The State of Iowa and those associated with it again submit that there are grave constitutional questions raised and involved herein which this Court needs to pass upon. That there have been flagrant violations of the Constitution and invasions of rights by the arbitrary and unconstitutional action of the Federal Power Commission herein, and that this Court cannot lightly pass over these charges by denying the Petition for a Writ of Certiorari. The fact matters which have been raised require review by this Court for the reason that we charge and earnestly believe that we can show this Court that there was a lack of evidence rather than a conflict of evidence upon many important factors entering into and affecting the findings and orders of the Commission complained of herein.

We respectfully request and pray that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 760

STATE OF IOWA, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (R. 11-25) is reported at 178 F. 2d 421. The order and opinion of the Federal Power Commission dated December 19, 1947 (R. 5 (91),[1] 7 (243)) are reported at 6 F. P. C.

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[1] The printed record here is paginated as follows: all of petitioners' petition for review in the court below, consisting of 17 pages, is included as page 3; all of the record filed below by petitioners, consisting of pages numbered 1 through 235,

227 and 73 P. U. R. (N. S.) 85; the Commission's order of September 8, 1948 (R. 5 (106)) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 28, 1949 (R. 25). The petition for rehearing seasonably filed by petitioners (R. 27-42) was denied on January 20, 1950 (R. 43). The petition for a writ of certiorari was filed on April 17, 1950. The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act and under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission and the court below improperly failed to pass upon petitioners' contentions that (a) the Commission is without jurisdiction to grant a license to First Iowa Hydro-Electric Cooperative for the construction of a hydroelectric project on and along the Cedar and Mississippi Rivers in the State of Iowa, and (b) that First Iowa's failure to submit evidence of compliance with certain state laws under Section 9 (b) of the Federal Power Act constituted a bar to the issuance of a license to it.

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is included as page 5; the Commission's supplement to the printed record below, consisting of pages numbered 236 through 257, is included as page 7; the proceedings in the court below have not been assigned a single page number but are numbered consecutively 9 through 44. Accordingly, references to page 11 of the record filed below by petitioners, and to page 11 of the proceedings below, for example, will appear as (R. 5 (11)) and (R. 11), respectively.

2. Whether the court below erred in refusing to set aside the Commission's order granting a license on the ground that it had not been established that First Iowa's proposed project is economically feasible.

3. Whether the Commission erroneously denied effect to the Act of August 14, 1946, 60 Stat. 1080, 16 U. S. 661, *et seq.*, relating to the protection and conservation of wild life.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Holding Company Act of August 26, 1935, c. 687, 49 Stat. 803, 838, 16 U. S. C. 791a, *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

STATEMENT

Petitioners here are seeking further review by this Court of the Federal Power Commission's (Commission) orders, approved below, for the issuance of a license to First Iowa Hydro-Electric Cooperative (First Iowa) for the construction of a hydroelectric project on and along the Cedar and Mississippi Rivers in Iowa. This license was issued after further proceedings before the Commission subsequent to this Court's remand in *First Iowa Hydro-Electric Cooperative* v. *F. P. C.*, 328 U. S. 152, No. 603, October Term, 1945.

A. *Proceedings Prior to Decision in* First Iowa *case:* On January 29, 1940, First Iowa filed with the Commission, pursuant to Section 23(b) of the Federal Power Act, a declaration of intention to construct a 15,000 kilowatt run-of-river hydroelectric project which would utilize the flow of the Cedar River, a tributary of the Iowa River, in Cedar and Muscatine Counties, Iowa, through a fall of about 35 feet. F. P. C. Docket No. DI-154. According to its usual practice, the Commission notified the State of Iowa of the filing of this declaration by letter dated February 7, 1940, addressed to its Governor (Tr. 3097),[2] but since it received no reply, did not advise the Iowa officials of the supplement to the declaration filed on April 2, 1941 (R. 7 (240)).[3] On June 3, 1941, the Commission entered its formal findings, a copy of which was sent to the Iowa Commerce Commission, in which it found that the Cedar and Iowa Rivers were navigable waters of the United States; that the proposed project would affect the navigable capacity of the Iowa and Mississippi Rivers and the interests of interstate commerce; and that a license for the construction proposed was required under the

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[2] References designated "Tr." are to the unprinted transcript which is on file with the Clerk of this Court.

[3] The supplement incorporated several additional features and, except for modifications here immaterial made at the suggestion of the Commission's engineering staff and of the Chief of Engineers, Department of the Army, proposed the project for which application for license was subsequently filed, *infra*, p. 5.

Federal Power Act (R. 7 (236, 238)). *First Iowa Hydro-Electric Cooperative,* 2 F. P. C. 958, 959, 960.

On August 11, 1941, First Iowa filed with the Commission, in a separate docket (F. P. C. Docket Project No. 1853), an application for a license to construct the project (R. 5 (1-6)).[4] The project as proposed and subsequently modified consisted of an earthen dam and dike across Cedar River about 21 miles above the junction of the Cedar and Iowa Rivers and about 49 miles above the mouth of the Iowa River, creating a reservoir of about 11,000 acres with usable storage capacity of about 72,000 acre-feet; a spillway section integral with the dam; a diversion canal approximately 8.5 miles long; a secondary dam and reservoir of about 920 acres on Mad Creek; a reservoir or forebay of approximately 160 acres created by the construction of a power dam across Geneva Creek overlooking the Mississippi River; a power plant consisting of four units aggregating 50,000 kilowatts capacity operating under an average net head of 103 feet, with two units having reversible pumping features and a tailrace 8,800 feet long parallel to the Mississippi River discharging into the pool below Navigation Dam No. 16 on that River (R. 5 (2-6)).

[4] Under Section 23(b) of the Act, no hydroelectric project which the Commission finds will affect the interests of interstate or foreign commerce can be lawfully constructed, maintained, or operated until a license for the project has been issued pursuant to an application therefor filed under Section 9 of the Act.

Petitioners, including the State of Iowa, intervened in the license proceeding objecting to the issuance of the license on the grounds among others (1) that First Iowa would not meet the requirements of Section 9(b) of the Act requiring submission of "satisfactory evidence" of compliance with the requirements of Iowa law since it had failed to secure a state permit for the project and (2) that the Cedar River was not a navigable water of the United States and therefore the Commission was without jurisdiction to grant the requested license (R. 5 (6-13, 28-39)).[5] The Commission, on January 29, 1944, dismissed First Iowa's application solely on the ground that it had not "presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of the applicable laws of the State of Iowa," but left the way open for First Iowa to renew the application within one year, upon satisfaction of these requirements (R. 5 (45)). *First Iowa Hydro-Electric Cooperative,* 4 F. P. C. 27, 32.

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[5] Chapter 363 of the Iowa Code, 1939 (now chapter 469, Code of Iowa, 1946) prohibited construction of a dam "in any navigable or meandered stream for any purpose, or in any other stream for * * * power purposes," unless a permit had been granted by the Iowa State Executive Council. Under the state statute governing action by the Council, it was provided that permit shall be issued only if it appears to the Council that, among other things, it "will not materially obstruct existing navigation * * * and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life."

After its petition for rehearing was denied by the Commission, First Iowa filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. In its petition for intervention which was allowed, the State relied only on the contention that First Iowa had failed to comply with Section 9(b) (No. 603, October Term, 1945, R. 37-39). The Court of Appeals affirmed the Commission's order (151 F. 2d 20) but this Court, on certiorari, reversed and remanded the case to the Commission, holding that Section 9(b) did not require showing of compliance with State law as a condition precedent to the issuance of a license. 328 U. S. 152. Although the State, in its brief in this Court, noted its contention that the Cedar River and the portion of the Iowa River here involved were non-navigable (see Brief for State of Iowa, Intervenor in No. 603, October Term, 1945, pp. 39-41), the Court approved the Commission's jurisdictional findings. 328 U. S. at 158-159, 163, see *infra,* p. 12. The State's petition for rehearing, strongly urging *inter alia* that the Court's opinion was "founded upon erroneous assumptions of fact and law that the Cedar River is a navigable water of the United States" (Pet. for Rehearing in No. 603, October Term, 1945, pp. 2, 4-11), was denied. 328 U. S. 879.

B. *This Proceeding:* Following the remand, the State, on June 28, 1946, petitioned the Commission to reopen the case for the presentation and con-

sideration of pertinent questions of law and fact, contending that the Commission lacked jurisdiction to license the proposed project because the Cedar River is non-navigable and, further, that if the Commission did assert jurisdiction it should take further evidence as to compliance with Section 9(b) (R. 5 (46-51)). The Commission, on August 6, 1946, ordered the record reopened but only for a further showing as to design and economic feasibility (R. 5 (52)).[6]

At the hearings before a Trial Examiner, which were confined to questions of design, economic feasibility and plans for financing, the State made an offer of evidence relative to the issue of jurisdiction which was rejected (R. 5 (220-222)). The Trial Examiner found that First Iowa planned to finance the entire cost of the project, which he found could reasonably be anticipated to be $23,000,000, by the sale of 40-year 4% revenue bonds, and that the project could be financed by the issuance of such bonds, amortized over a 30-year period, if the applicant had binding contracts for the sale of electric energy for a period of about ten years, with sufficient operating revenues assured to cover the estimated cost of operation, maintenance, reserves, and 133 per cent of the debt service (R. 5 (85)). The Examiner found, however, that First

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[6] The State's further petition to reconsider the Commission's jurisdiction was denied on September 24, 1946 (R. 5 (53-66, 67-70, 70-71)).

Iowa had no binding sales contracts, no assurance of such revenues, and no firm commitments for financing (R. 5 (85)), and concluded that "the issuance of a license is not justified by the record as it now stands" (R. 5 (86)).

The Commission heard oral argument on exceptions to the Trial Examiner's report (R. 5 (89)) and thereafter denied the State's petition to reconsider directed against the Commission's refusal to reconsider its jurisdiction (R. 5 (90)). The Commission, on December 19, 1947, authorized the issuance of a license for the project to First Iowa (R. 5 (91-94)), subject to the condition that the authorization would terminate within nine months, unless otherwise ordered by the Commission, if the Chief of Engineers and the Secretary of the Army failed to approve the project plans in accordance with Section 4(e) of the Act, and if First Iowa failed to submit satisfactory evidence of commitments to finance the project's construction (R. 5 (92)).[7]

Thereafter, on August 31, 1948, First Iowa advised the Commission that the Chief of Engineers and the Secretary of the Army had approved the project plans (R. 5 (97)). In compliance with the

[7] Iowa's petition for rehearing of January 19, 1948, addressed to the authorization of the license (R. 5 (94)) was denied by the Commission on the ground that since the authorization contained conditions precedent to the issuance of the license, none of which had been complied with, it was only an intermediate order dependent upon further order of the Commission to make it final (R. 5 (95)).

requirement of submission of satisfactory commitments to finance construction of the project, First Iowa submitted a letter from the Acting Administrator of the Rural Electrification Administration relative to the need and market for the power to be generated by the project (R. 5 (99))[8] and a letter from A. L. McDougal, Jr., President of McDougal & Condon, Incorporated, indicating that that firm would complete the financing program as soon as the license for the project was issued (R. 5 (98)).[9] Although the State protested that these

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[8] The Acting Administrator stated:

> This is in response to your request that we comment upon the possibilities of your supplying power to REA cooperatives in the area of your proposed hydro-electric development. As you know, the REA does not purchase electricity for its borrowers, but assists them in their negotiations with suppliers of energy and approves or rejects wholesale power contracts.
>
> Rural electric loads have increased greatly in the past few years and are expected to continue growing in the future. This is especially true in the area surrounding the proposed hydro development, load data for which have been made available to you. It is our opinion that a market for the sale of power to the REA cooperatives in the area exists and will exist in the future if energy is made available to our borrowers at sufficiently low cost.

[9] Mr. McDougal's letter reads:

> The primary purpose of this letter is to enable you to meet the requirements of the Federal Power Commission under its order of December 19, 1947 (Project No. 1853) that your Corporation submit satisfactory evidence of commitments to finance the construction of the project.
>
> As you know, with our consulting engineers, and your Co-operative, we have been engaging in negotiations with the Rural Electrification Administration to determine that administration's attitude toward the use of all the capacity and energy to be available at the project for a federation of Rural Electrification Administration Co-

letters did not comply with conditions of the order of December 19, 1947 (R. 5 (100-105)), the Commission, having previously concluded that "construction of this project would be beneficial to the area involved" (R. 7 (247)) and that the "applicant appears to be able to finance" (R. 7 (246)), on September 8, directed the issuance of a license to First Iowa to be effective as of September 1, 1948 (R. 5 (106-111)). In addition to the usual terms and conditions, the license was to require First Iowa to "construct, maintain and operate such fish protective devices and * * * [to] comply with such reasonable conditions in the interests of fish life as may be hereafter prescribed upon the recommendation of the Secretary of the Interior" (R. 5 (107-108)). The Commission denied petitioners' application for rehearing (R. 5 (111-149, 149)), and the court below denied their petition to set aside the Commission's orders (R. 3 (1-17), 11-25).

ARGUMENT

1(a). The *First Iowa* case (328 U. S. 152) disposes of petitioners' contention in regard to the Commission's jurisdiction to authorize the con-

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operatives, and we have satisfied ourselves that there will be a market for all of this energy and capacity. Accordingly, we feel that the obligations which your corporation can issue for construction purposes will be marketable.

When the license for the project shall have been issued by the Federal Power Commission, we will be glad to proceed with the completion of your financing program.

struction of the project here involved. In that case, this Court flatly stated (328 U. S. at 163):

> * * * For the purposes of this application it is settled that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, each of which has been determined to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction a license from the Commission. *The project is clearly within the jurisdiction of the Commission under the Federal Power Act.* [Emphasis supplied.]

The question as to the existence *vel non* of Commission jurisdiction had to be decided before reaching the controversy as to the meaning of Section 9(b). If the Commission were without jurisdiction to license the project, there would have been no necessity for reaching the very difficult question of construction of Section 9(b), since the determination of its meaning in that setting would have been purely advisory. That the State of Iowa regarded this Court's statement in the *First Iowa* case as upholding the Commission's jurisdiction is amply demonstrated by its petition for rehearing in which it devoted eight pages to arguing that this Court had erred in apparently upholding the Commission's jurisdiction. The jurisdictional question having already been de-

cided by this Court, the Commission and the court below were plainly correct in refusing to reopen it.[10]

(b). The *First Iowa* case also disposes of petitioners' contention that the Commission's order directing the issuance of a license to First Iowa violates Section 9(b) of the Act by failing to require evidence of compliance by First Iowa with Iowa law. That precise question was before this Court in *First Iowa* and the Court's opinion makes it clear that Section 9(b), as it read it, did not require a showing of compliance with the provisions of Iowa law relied upon by petitioners as a condition precedent to the issuance of a license. See 328 U. S. at 162 *et seq. passim.* For example, the Court stated (328 U. S. at 170, 162):

> The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the

[10] The disposition of the jurisdictional question in the *First Iowa* case was, we submit, clearly sound. For even if it be assumed *arguendo* that the Cedar River is not navigable, as petitioners claim (Pet. 6, 16), the Commission nevertheless has jurisdiction to authorize the project by virtue of the navigability of the Iowa and Mississippi Rivers and the effect of the proposed project upon the navigability of those rivers and the interstate commerce thereon. Section 23(b); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 399, 401, 402; *Wisconsin Public Service Commission* v. *F. P. C.*, 147 F. 2d 743 (C.A. 7), certiorari denied, 325 U.S. 880; *Georgia Power Co.* v. *F. P. C.*, 152 F. 2d 908 (C.A. 5); cf. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508.

> absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements.
>
> * * * * *
>
> * * * The Commission would have been justified in following its own interpretation of the Federal Power Act [that as to this project the requirements of Chapter 363 of the Code of Iowa have been superseded by those of the Federal Power Act] and proceeding with the merits of the application without requiring * * * [First Iowa] to submit evidence of its compliance with the terms of Chapter 363, or of any other laws of the State of Iowa, which the Commission held to be inapplicable or to have been superseded by the Federal Power Act.

2. Contrary to petitioners' contention (Pet. 25), the Act does not require, as a requisite to the granting of a license, that economic feasibility be demonstrated by a showing of firm selling contracts or firm commitments to finance construction. The Act's sole requirement as to economic feasibility is contained in Section 10(a), which provides that

> the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to the comprehensive plan for improving or developing a waterway or waterways for

> the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes * * *.

In its January 29, 1944, opinion accompanying the order dismissing First Iowa's application because of lack of compliance with Section 9(b), the Commission found (4 FPC at 29-30):

> * * * The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable.

And in its December 19, 1947, order authorizing the issuance of a license upon certain conditions precedent, the Commission further found (R. 5(91)):

> * * * the proposed project is best adapted to a comprehensive plan for improving and developing the Cedar and Mississippi Rivers for the use and benefit of interstate commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

These findings clearly meet the requirements of Section 10(a), and since petitioners do not claim

that these findings are not supported by substantial evidence, they are conclusive here. Section 313(b) of the Federal Power Act; *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 145-146; *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 11, 130-131.

Findings as to other aspects of economic feasibility, including marketability of electricity and commitments to finance, are not statutory requisites to the issuance of a license. They are only factors, among others, which the Commission considers in determining whether, in the exercise of its broad discretion under the Act—a discretion which is at least as broad, if not broader than, its discretion to issue certificates of public convenience and necessity under the Natural Gas Act (cf. *Panhandle Eastern Pipe Line Co.* v. *F. P. C.,* 169 F. 2d 881 (C.A.D.C.), certiorari denied, 335 U.S. 854)—it should issue a license in the circumstances of the particular case. In the instant case, the Commission, in its opinion accompanying the December 19, 1947, order, recognized that no firm commitments as to financing the construction or sale of electricity could be obtained in advance of the actual license authorization (R. 7(245)), and conditioned its authorization on the furnishing within nine months of "satisfactory evidence of commitments to finance construction of the project" (R. 5(92)). First Iowa thereafter submitted a letter from the Acting Administrator of the Rural Electrification Administration relative

to the need and market for the power to be generated by the project (*supra,* p. 10, fn. 8) as well as a letter from McDougal and Condon indicating that it would complete the financing program as soon as the license was issued (*supra,* p. 10, fn. 9).[11] The Commission was plainly justified in accepting these letters as satisfactory evidence of commitments to finance the project in the light of its conclusion, which has not been questioned, that the limited disadvantages of the project brought to its attention would be far outweighed by the benefits which the project would confer—a peak load plant serving a very important function in supplying the power requirements of the area which, without the project, lacked any substantial hydroelectric "peaking" capacity (R. 7(247)).[12] In these

[11] The Trial Examiner's report recommending against issuance of the license on "the record as it now stands" (R. 5(86)) was filed on January 30, 1947, about a year and a half before the submission of these letters on August 31, 1948.

[12] The Chairman's dissent, referred to below (R. 23), recognized the "obvious potentialities of the project in a fully coordinated electric supply system" and indicated that, in his view, the Commission should grant First Iowa "a reasonable additional period—say ninety days—within which to perfect its showing in a more specific and definite fashion. The progress already made by Applicant indicates that this should not be unduly difficult" (R. 5(110-111)).

In this connection it is significant that Section 13 of the Act authorizes the Commission to terminate a license if the licensee fails to commence construction of the project within two years and in good faith and due diligence to "prosecute such construction." Accordingly, if First Iowa's financing should not be completed as proposed and it is unable to commence construction because of its inability to obtain financing from other sources within the specified time limits, its license may be terminated by the Commission.

circumstances, the court below clearly committed no error in refusing to set the Commission's order aside for lack of showing of economic feasibility (R. 24). See, *e.g., N.L.R.B.* v. *Stowe Spinning Co.,* 336 U.S. 226, 231; *N.L.R.B.* v. *Link-Belt Company,* 311 U.S. 584, 597; *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 146; cf. *Panhandle Eastern Pipe Line Co.* v. *FPC,* 169 F. 2d 881 (C.A.D.C.), certiorari denied, 335 U.S. 854.

3. Petitioners' final contention that the Commission failed to give proper effect to the requirements of the Act of August 14, 1946 (60 Stat. 1080, 16 U.S.C. 661) relating to the protection and conservation of wildlife (Pet. 14-15) "is, we think, without substantial merit" (R. 24).

The Iowa Conservation Commission was permitted to intervene in the license proceeding and was a party throughout. Mr. F. T. Schwob, its director, and Dr. Reeve N. Bailey of the Department of Zoology and Entomology of the Iowa State College, testified with regard to fish life in the area and the probable effect of the project thereon on the basis of actual surveys they made on the spot after receiving the Commission's notice (Tr. 1652-1851). They were given an opportunity to make any recommendations they desired in connection with the issuance of the license. Moreover, at the hearing following the remand, the Chief Biologist of the State

Conservation Commission testified, but was not prepared to make any further recommendations beyond those already been made (Tr. 3663-3672). The receipt of these views and recommendations plainly satisfied the requirement of Section 2 of the wildlife statute (16 U.S.C. 662) that the Commission "shall consult with * * * the head of the agency exercising administration over wildlife resources of the State wherein the impoundment * * * is to be constructed with a view to preventing loss of and damage to wildlife resources." This provision does not require that the recommendations of the State wildlife agency be adopted as condition precedent to the issuance of a Federal permit or license, but rather that "due consideration be given to the requirements of these [wildlife] resources as well as the requirements of such other resources as may be affected by those programs." H. Rep. No. 1944, 79th Cong., 2d sess., p. 3; see, also, S. Rep. No. 1698, 79th Cong., 2d sess., p. 3; S. Rep. No. 1748, 79th Cong., 2d sess., p. 3.

The further provision of Section 2, that the Commission consult with the Fish and Wildlife Service of the Department of the Interior, is amply satisfied by the terms of the license granted by the Commission requiring First Iowa to "construct, maintain, and operate such fish protective devices and * * * [to] comply with such reasonable conditions in the interests of fish life as may be here-

after prescribed upon the recommendation of the Secretary of the Interior" (R. 5(107-108)).

CONCLUSION

The judgment below is correct and, in large part, simply echoes this Court's decision in the *First Iowa* case. There is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 760

IN THE

Supreme Court of the United States

October Term, 1949

STATE OF IOWA, CONSERVATION COMMISSION OF IOWA, HIGHWAY COMMISSION OF IOWA, GEORGE CORRIELL, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*
FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, *Intervenor*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE INTERVENOR IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1949

No. 760

STATE OF IOWA, CONSERVATION COMMISSION OF IOWA, HIGHWAY COMMISSION OF IOWA, GEORGE CORRIELL, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*
FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, *Intervenor*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE INTERVENOR IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (R. 11-25) is reported at 178 F. 2d 421. The order of the Federal Power Commission here involved (R. 106-111, cf. 91-94) is not yet officially reported.

JURISDICTION

The judgment of the Eighth Circuit was entered on December 28, 1949 (R. 25). A petition for rehearing was denied January 20, 1950 (R. 43). The petition for certiorari was filed on April 17, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under the Federal Power Act to license the power project proposed by First Iowa Hydro-Electric Cooperative on and along the Cedar and Mississippi Rivers in Muscatine and Cedar Counties, Iowa.

2. Whether there is substantial evidence in the record to support the Commission's finding that the project in question is economically sound, practicable, and feasible.

3. Whether the Commission erred in failing to require First Iowa Hydro-Electric Cooperative to comply with certain Iowa statutes in conflict with the Federal Power Act.

4. Whether the Commission failed to give effect to the Wildlife Resources Act of August 14, 1946.

STATEMENT

In 1929 the Chief of Engineers (U. S. Army) submitted to Congress a report covering navigation, flood control, power development and irrigation on the Iowa River and its tributaries.[1] In this report the Chief of Engineers recognized that the diversion of substantially all of the waters of the Cedar River near Moscow, Iowa to the

[1] H. R. Doc. No. 134, 71st Cong. 2d Sess. 86, 87, 90.

Mississippi River near Muscatine, Iowa was an engineering possibility and constituted the largest power development foreseeable on either the Cedar or Iowa Rivers. First Iowa Hydro-Electric Cooperative (hereinafter referred to as First Iowa) was organized in 1938 under the laws of Iowa,[2] as a non-profit cooperative association, with a view to developing such a project on the Cedar River near Moscow and Muscatine, Iowa. First Iowa obtained options to 98% of the riparian rights on the Cedar River in that area. 328 U. S. 152, 158.

On January 29, 1940 First Iowa, pursuant to section 23(b) of the Federal Power Act, 16 U. S. C. sec. 817, filed a declaration of intention with the Federal Power Commission for a hydro-electric development utilizing the waters of the Cedar River in Cedar and Muscatine Counties, Iowa (Tr. 3099). In accordance with its usual practice, the Commission notified the Governor of Iowa by letter dated February 7, 1940 of the filing of this declaration of intention by First Iowa (Tr. 3097). On April 2, 1941 the original declaration of intention was supplemented to extend the power development, by means of a diversion canal, to the Mississippi River north of Muscatine, Iowa (Tr. 3105). On June 3, 1941 the Commission made the following findings (R. 238):

> (1) The Cedar and Iowa Rivers are navigable waters of the United States;
>
> (2) The diversion of water from the Cedar River by means of the diversion canal as set forth above would have a direct and substantial effect upon the flow and stage of the Iowa River and hence would affect the navigable capacity of that river;
>
> (3) The alternate withholding of water in the reservoir and canal during periods of shut-down of the power plant and the release of water at substantial rates of flow during periods of operation of the power plant, as set forth above, would cause extreme fluctua-

[2] Ch. 390-G-1 and section 8341 of the Iowa Code of 1935.

tions in the flow of the Mississippi River at Muscatine, Iowa, and would substantially affect the navigable capacity of that river;

(4) The interests of interstate commerce would be affected by construction of the project as described in the declaration of intention as supplemented;

(5) The two small islands . . . [in the Cedar River] are public lands of the United States and will be partly or wholly flooded by the reservoir of the proposed project and will be occupied by the project;

(6) A license for the construction proposed above is required under the provisions of the Federal Power Act.

A copy of these findings was transmitted to the State Commerce Commission, Des Moines, Iowa. From these findings the State of Iowa filed no petition for rehearing or for court review. The sixty days thus allowed for review having expired, First Iowa on August 11, 1941, pursuant to section 4(e) of the Federal Power Act, filed an application with the Federal Power Commission for a license to construct, operate and maintain the proposed power development project on the Cedar and Mississippi Rivers (R. 1-6). It was at this stage of the proceedings that the State of Iowa, on October 16, 1941, petitioned to intervene for the first time (R. 6-13). The petition was allowed on November 4, 1941 (R. 6). Other state agencies intervened at approximately the same time (R. 28-39).

After extended hearings the Commission on January 29, 1944 found that the applicant's "present plans call for a practical and reasonably adequate development to utilize the head water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable" (Tr. 3387). The Commission, nevertheless, dismissed the application for license upon the finding that the "applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the require-

ments of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice" (R. 45). In further explanation of its dismissal, the Commission stated that the "appropriate place for a determination of the validity of such State laws [of Iowa requiring a license from the State Executive Council] is in the court and, if we dismiss the application for license on the basis of failure to comply with the requirements of Section 9(b), applicant may seek review of our action and its contentions under Section 313(b) of the Federal Power Act" (Tr. 3389-3390).

A petition for rehearing having been denied (Tr. 3401), First Iowa petitioned the United States Court of Appeals for the District of Columbia for review. The State of Iowa intervened. That court affirmed the order and opinion of the Commission. *First Iowa Hydro-Electric Coop.* v. *Federal Power Com'n.*, 80 App. D. C. 211, 151 F. 2d 20 (1945).

Thereupon First Iowa applied for and over the State's objections obtained a writ of certiorari. The State thereafter filed a brief on the merits and participated in the oral argument, contending *inter alia* that the Cedar and Iowa rivers were non-navigable (No. 603, Oct. Term 1945, Br. 39-41). This Court reversed (*First Iowa Hydro-Electric Coop.* v. *Federal P. Com.*, 328 U. S. 152), holding (p. 181) that "the detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls" and (p. 182) that "it is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon [power developments on navigable waters of the United States] on behalf of the people of Iowa as well as on behalf of all others." In the course of its opinion, this Court pointed out (p. 159, fn. 4) that

the Commission on February 7, 1940 "had sent notice to the Governor of Iowa of the filing of the original declaration of intention and invited him to present information and comments relative thereto. The State, however, took no part in the proceedings." This Court further observed that "the findings made by the Commission on June 3, 1941, in response to the petitioner's declaration of intention are not in question. *For the purposes of this application*[3] [for a license from the Federal Power Commission] it is *settled* that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, each of which has been *determined* to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction a license from the Commission. *The project is clearly within the jurisdiction of the Commission under the Federal Power Act*" (p. 163). The judgment of the Court of Appeals for the District of Columbia was accordingly reversed with directions to remand the case to the Commission for further proceedings in conformity with this Court's opinion.

The State of Iowa filed a 31 page petition for rehearing in which it contended that "Cedar River is not a navigable water of the United States," and hence not subject to the jurisdiction of the Federal Power Commission, citing *inter alia* the Acts of Congress of May 6, 1870 and August 18, 1894 (No. 603, Oct. Term 1945, Pet. for Rehearing, pp. 2-11, 26-28, 30-31). Rehearing was denied (328 U. S. 879).

Being of the opinion that the record should be supplemented by a further showing as to the design and economic feasibility of the project under 1946 conditions, the Commission by order dated August 6, 1946 (R. 52), re-

[3] Italics supplied throughout this brief.

opened the record in conformity with this Court's opinion and set the matter down for public hearing upon those points. In view of its own findings in the June 3, 1941 order and the explicit language of this Court's opinion, it denied the petition of the State of Iowa seeking to reopen the issues of jurisdiction and navigability (R. 46, 70). Further hearings were held by the Federal Power Commission in September and October 1946 before a Trial Examiner. It was at this point in the proceedings that George Corriell and certain other landowners directly affected by the project became parties intervenor (R. 39-43). In due course, after oral argument, the Commission on December 19, 1947 issued a preliminary opinion stating that it would issue a license for the construction of the proposed project if certain specified conditions were complied with by First Iowa (R. 243-248). On September 8, 1948 the Commission found that these conditions had been met and issued a license to the applicant to construct and operate the proposed project (R. 106-111).

After denial by the Commission of a petition for rehearing (R. 111-150), the State of Iowa and those associated with it petitioned the Eighth Circuit for review. First Iowa was allowed to intervene (R. 10). On December 28, 1949 the Eighth Circuit unanimously denied the State's petition to set aside the orders of the Federal Power Commission (R. 25-26). A petition for rehearing was similarly denied January 20, 1950 (R. 43).

ARGUMENT

I

Petitioners' present attacks (Pet. 4-5, 6-10, 15-24) on the jurisdiction of the Federal Power Commission to license the Moscow dam project on the Cedar and Mississippi Rivers in Muscatine and Cedar Counties, Iowa, have been previously considered and rejected by this Court in its earlier review of the proceedings in this case. That determination, if not *res judicata*, has certainly become the law of the case.

Notice of the filing by First Iowa of its declaration of intention to utilize the waters of the Cedar River for a hydro-electric power project was sent to the Governor of Iowa in accordance with the Commission's usual practice in section 23(b) proceedings (Tr. 3097). The State did not intervene. On June 3, 1941 the Commission found that the proposed project would affect navigable waters of the United States and that a federal license was therefore required under the Federal Power Act (2 F. P. C. 958). A copy of these findings was likewise served on State officials of Iowa. No petition for rehearing or for court review was filed by the State of Iowa within the statutory period prescribed by the Federal Power Act. Sections 313(a) and (b); 16 U. S. C. secs. 825 l(a) and (b). The jurisdictional findings of the Commission are thus *res judicata*.

By subsequently intervening in the license application proceeding instituted by First Iowa on August 11, 1941, the State of Iowa became a party to the proceeding as it then stood and could not relitigate issues already resolved. *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489, 498.

In any event, by reason of the previous appeals in this proceeding, the Commission's jurisdictional findings have become the law of the case. On January 29, 1944 the Com-

mission dismissedl, without prejudice, First Iowa's application for a licensee. From that dismissal order First Iowa took an appeal to the United States Court of Appeals for the District of Collumbia, which affirmed the action taken by the Federal Power Commission. From there the case came to this Court on certiorari. The State of Iowa actively participatted in the review proceedings in both courts as a party intervenor. It was free to defend the dismissal order on any grounds it saw fit, including jurisdictional grounds, and such arguments were advanced by the State in its brief on the merits (No. 603, Oct. Term 1945, Br. 39-41) and in a subsequent petition for rehearing (No. 603, Oct. Term 1945, Pet. for Reh. pp. 2-11, 26-28, 30-31).

This Court nevertheless reversed the Commission's order of dismissal and remanded the case to the Federal Power Commission for further proceedings. After quoting in full the Commission's jurisdictional findings of June 3, 1941, this Court made pointed reference to the fact that the Commission had sent notice to the Governor of Iowa of the filing of the declaration of intention and that "the State, however, took no part in the proceedings" (328 U. S. 159). Regarding the jurisdictional findings of June 3, 1941, the Court thereafter made this comment at page 163:

> "For the purposes of this *application* it is settled that the project will affect the navigability of the **Cedar, Iowa and Mississippi Rivers, each of which has** been determined to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction a license from the Commission. *The project is clearly within the jurisdiction of the Commission under the Federal Power Act.*"

From the context and from other passages in the opinion, it is obvious that this Court was referring to First Iowa's

"application" for a license and not its "petition" for certiorari. In short, for purposes of its application to construct a hydro-electric power project on the Cedar and Mississippi Rivers, it was "settled" and "determined" that the rivers in question are "part of the navigable waters of the United States" and that "the project is clearly within the jurisdiction of the Commission under the Federal Power Act". In a subsequent 31 page petition for rehearing the State argued at length that the judgment of the court below dismissing First Iowa's application for a license should be affirmed on the ground that the Cedar River was not a navigable water of the United States, citing the Act of Congress of August 18, 1894, and numerous other authorities upon which the State again relies in its instant petition (Pet. 6, 16). The Commission's jurisdictional findings have thus become the law of the case and should not be reopened on a subsequent petition to this Court. *Washington Bridge Co.* v. *Stewart,* 3 How. 413, 425; cf. *Sunshine Anthracite Coal Co.* v. *Atkins,* 310 U. S. 381, 403.

It is well settled that after a case has been taken to this Court and there decided and a mandate issued to the court below, that if the case is taken up for review a second time, it brings up for review nothing but the proceedings subsequent to the mandate. *In re Potts,* 166 U. S. 263, 267; *National Labor Rel. Board* v. *Donnelly Garment Co.,* 330 U. S. 219, 227-228.

In view of this Court's categorical language in its earlier opinion in this proceeding and its pointed reference to the jurisdictional findings of June 3, 1941, the Commission rightly determined on remand to refuse to hear further evidence on jurisdictional questions and to confine the further hearings to bringing the record up to date on the questions of design and economic feasibility. The Commission was not required to reopen any issue as to which its ruling was left unassailed by this Court's previous

decision. *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 146; *United States* v. *Morgan*, 307 U. S. 183, 186-187.

While the rule of the law of the case is a rule of practice, it is nevertheless based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. Cf. *United States* v. *U. S. Smelting, Refining & Mining Co.*, (No. 173, Oct. Term 1949, decided March 28, 1950). Administrative and judicial proceedings in connection with First Iowa's application for a license for its power project in Iowa have already dragged out for ten years. Under the terms of the license granted September 8, 1948, construction must be begun within two years. Financing cannot be concluded with litigation pending. A grant of certiorari to review jurisdictional questions already resolved by this Court would carry this case over to the October Term 1950, beyond the two-year period allowed for commencement of construction. The doctrine of the law of the case is clearly a salutary one under these circumstances.

Furthermore, this Court will certainly take judicial notice of the fact that the Mississippi River is a navigable interstate stream. *Arizona* v. *California*, 283 U. S. 423, 452. It is a fact too clear to admit of argument that the diversion of the waters of the Cedar River into the Mississippi River near Muscatine, Iowa, rather than at the confluence of the Iowa and Mississippi Rivers some 20 miles to the south, will affect the flow of the Mississippi River for at least a distance of 20 miles and thus affect interstate commerce. This fact alone confers jurisdiction on the Federal Power Commission. *Georgia Power Co.* v. *Federal Power Commission*, 152 F. 2d 908 (C. C. A. 5, 1946); cf. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 399, 401, 402, 419-428.

II

There is a short answer to petitioners' next contention (Pet. 12-13, 24-25) that the project is not economically feasible. Section 313(b) of the Federal Power Act expressly provides that the findings of the Commission as to the facts, if supported by "substantial evidence", shall be conclusive on the courts. 49 Stat. 860, 16 U. S. C. sec. 825 l(b). Under such a statute the courts will not reweigh the evidence and substitute their judgment for that of the administrative agency. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596-597.

The Commission considered voluminous testimony on the question of economic feasibility, only a portion of which was included by petitioners in the printed record in the court below. Some of the additional evidence in support of the Commission's finding that the project is economically feasible was included in a supplemental record printed by the Federal Power Commission (R. 249-257). Additional testimony (not printed) was supplied by applicant's own witnesses, e. g. Nash (Tr. 3174, 4909) and Holway (Tr. 3042, 3096, 3168, 4741). Since the record contains substantial evidence in support of the Commission's findings (e. g. R. 249-257), the findings on economic feasibility, being findings of fact, are thus conclusive under Section 313(b) of the Federal Power Act. *Montana Power Co.* v. *Federal Power Commission*, 112 F. 2d 371-374 (C. C. A. 9, 1940). Certiorari does not ordinarily lie to review evidence or the inferences to be drawn therefrom. *General Talk. Pictures Corp.* v. *Western El. Co.*, 304 U. S. 175, 178; *National Labor Rel. Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, 208-209.

III

Petitioners' further contention (Pet. 13-14, 25-26) that the Commission, on remand, ignored section 9(b) of the Federal Power Act and the mandate of this Court is with-

out merit. This Court, in its prior decision in this proceeding, held that section 9(b) of the Federal Power Act does not require the Commission to compel an applicant to comply with conflicting requirements of state law. 328 U. S. 152, 162, 170. This Court further held (p. 181) that the "detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls", a result previously reached in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 404-405, 426-427. "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others" (p. 182). This Court elsewhere observed that "if it had been the wish of Congress to make the applicant obtain consent of state, as well as federal authorities, to each project, the simple thing would have been to so provide", but that section 9(b) had not so provided (p. 178).

It is thus clear that the Commission was not required under section 9(b) of the Act to give further consideration to the conflicting provisions of Iowa State law relied upon by petitioners. The subsequent proceedings before the Commission were in complete conformity with this Court's opinion and the resulting mandate.

IV

Petitioners' final contention (Pet. 14-15), not briefed, that the Commission ignored and refused to give effect to the Wildlife Resources Act of August 14, 1946 is devoid of merit. In view of the limited issues left to be determined on remand, it is doubtful whether the Act of August 14, 1946 adopted in the interval between the first and second hearing should be given retroactive application in a proceeding theretofore begun and substantially concluded. *United States Fidelity Company* v. *Struthers Wells Co.*, 209 U. S. 306, 314. In any event the Commis-

sion's order of September 8, 1948 granting the license in question carefully provides for the protection of fish and wildlife resources. Paragraph 12(c) states that "the licensee shall construct, maintain, and operate such fish protective devices and shall comply with such reasonable conditions in the interests of fish life *as may be hereafter prescribed* upon the recommendation of the Secretary of the Interior" (R. 106, 108). Since the Act of August 14, 1946 merely requires "consultation" with State agencies (60 Stat. 1080), the Commission has given due effect to the Wildlife Resources Act of August 14, 1946.

CONCLUSION

The questions presented were correctly decided by the court below. There is no conflict of decisions. The jurisdictional objections which petitioners seek to raise have already been rejected by this Court in its previous consideration of this case. The other issues present no questions of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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